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IN REMEMBRANCE OF DEAN ROBERT YEGGE

THE HONORABLE PATRICIO M. SERNA[†]

I am truly honored to write a tribute to the late Dean Robert Yegge, who passed away peacefully on December 16, 2006. My tribute to the Dean will focus on his accomplishments in securing diversity and inclusion at the Sturm College of Law and in pioneering a multi-disciplinary approach to legal education, thereby enhancing the legal profession throughout this great nation. I contributed a short essay in honor of the 75th anniversary of the *Denver University Law Review* in 1998 wherein I stated:

Thank you, Dean Yegge, for giving us the opportunity to be major contributors to society and to pursue our dreams. Thank you also for being a visionary that brought the law school to national prominence by recognizing the importance of educating lawyers in disciplines other than law in order to enhance their ability to analyze fully both legal doctrine and issues of public policy. Under your leadership, the law school became not only a teaching institution, but also a research organization and a center of community action and service programs. You pioneered the multi-faceted approach to legal education that today is prevalent in our nation's law schools.

I stated the following at the Memorial Service for Dean Yegge on January 13, 2007:

There is a Native American saying: "We will always be remembered forever by the tracks we leave." Dean Yegge left deep and distinctive tracks of enormous integrity, enlightened wisdom, the courage of a lion, a nurturing and caring heart, unselfish generosity and consideration of others, illuminating vision, and moving inspiration. The Dean not only recognized and appreciated the value of diversity and inclusion – he did something about it – because as he once said, "It was the right thing to do; it needed to be done."

In the early 1960s, there was a profound dearth of Hispanic lawyers in the southwest. The Dean obtained a Ford Foundation grant in

[†] Patricio M. Serna is a Justice of the New Mexico Supreme Court, having been sworn in on December 5, 1996. He served as Chief Justice during 2001 and 2002. He was appointed as a District Court Judge to the First Judicial District in Santa Fe and served for over eleven years, from 1985 until 1996, during which he was also President of the New Mexico District Judges Association. As the first person in his family to attend college, he earned a Bachelor of Science degree in Business Administration from the College of St. Joseph on the Rio Grande, a Juris Doctor degree from the University of Denver School of Law, a Master of Laws degree from Harvard Law School, and an honorary Doctor of Laws Degree from the University of Denver School of Law. He taught as an adjunct professor at Georgetown University Law School and Columbus School of Law at Catholic University of America in Washington, D.C.

1967 for an intensive summer law program for Hispanics. I was a member of the first class of twenty individuals. Eleven of us were awarded full tuition and a fellowship to this great law school. All eleven of us were successful in the study of law, and we all passed the bar exams in our respective states.

The first summer preparatory program was such a resounding success that shortly thereafter the Council on Legal Education Opportunity (CLEO) was founded as a non-profit project of the ABA Fund for Justice and Education to expand opportunities for minority and low-income students to attend law school. Over the past thirty-five years, more than 7500 students have participated in CLEO's pre-law and law school academic support programs, successfully matriculated through law school, passed the bar exam, and joined the legal profession. Can you imagine? Our very own visionary Dean Yegge started the ball rolling at this law school in this extremely successful, productive, and noble endeavor that has greatly enhanced diversity and inclusion in our nation's law schools and in the legal profession.

Dr. Martin Luther King, Jr., said, "Life's most persistent and urgent question is: what are you doing for others?" Dean Yegge immediately comes to mind. He made a monumental difference, and this difference serves as a major cornerstone of his wonderful life legacy.

I have personally benefitted from his legacy, as well as from our friendship which spanned forty years. I'm so proud that the Dean came to Santa Fe in 1996 and spoke at my swearing in to the New Mexico Supreme Court. He also attended my swearing in as Chief Justice in 2001.

It has been said that "some people come into our lives and quietly go. Some people move our soul to dance. They awaken us to new understanding with the passing whisper of their wisdom. Some people make the sky more beautiful to gaze upon. They stay in our lives for awhile, leave footprints in our hearts, and we are never, ever the same." This was Dean Yegge. The essence and content of his character are personified by the distinctive tracks he left us to forever remember him.

Those of us who were touched by Dean Robert Yegge will never forget him. His innovative and caring spirit will continue to inspire future students at this great law school.

TRIBUTE TO BOB YEGGE

JOHN E. MOYE[†]

Bob Yegge's cookouts on Yegge Peak were legendary, with specially "flavored" steaks and beans and entertainment provided by the participants, including mandolins and piano concerts, and Bob's special hospitality. All of his friends remember Bob on their favorite Yegge Peak excursion. Other friends remember his masquerade as Santa Claus every Christmas, visiting his friends' homes with a genuine "ho ho ho" that only Bob could produce from his commanding, senatorial voice. The joy he brought to the children of the homes he visited was remembered tearfully by those paying their respects at his services. His act as Santa Claus was reportedly even recognized in the record of the United States Supreme Court.¹ Other friends remember Bob's generosity and spirit, noting his philanthropy to animal causes and his participation in multiple civic and community activities. And there was Bob's style—charismatic, bombastic, cheerful, and genuine. He filled the room when he came in, and his infectious laugh was his trademark. His vanity license plate said "Harump"—his tongue-in-cheek way of jovially dismissing the world.²

Bob will be remembered for all of those characteristics, but an essay about him in the *Denver University Law Review* should remember him most for his commitment to legal education and the administration of courts and the legal profession.

I served as Professor of Law and Associate Dean for Academic Affairs when Bob Yegge was the Dean during the 1970s. His vision for the College of Law was to assemble an all-star faculty who were prominently recognized for their respective specialties. He recruited outstanding scholars, such as Bill Beaney, Eli Jarmel, and Ved Nanda. He identified and hired outstanding teachers, such as Jan Laitos, Frank Jamison, and Jim Winokur. He gained the respect and admiration of the faculty he inherited, including the legendary Professor Thompson Marsh,

[†] John E. Moye is a partner in the Denver law firm Moye White LLP. He served as Professor of Law at the University of Denver College of Law from 1974-1979 and Associate Dean for Academic Affairs from 1974-1976. He was President of the Colorado Bar Association from 2002-2003 and is a member of the Board of Advisors to the Institute for the Advancement of the American Legal System at the University of Denver.

1. Reportedly, when Bob Yegge appeared before the United States Supreme Court and introduced himself, Associate Justice Byron White interrupted him to ask if he had ever been known by an alias. "In my house," the Justice said, "he is known as Santa Claus."

2. The word "harumph" is defined as "[a]n expression of disdain, disbelief, protest, refusal or dismissal." Wiktionary, <http://en.wiktionary.org/wiki/harumph>. The abbreviated version of the word on the license plate was a product of a limitation on Colorado license plates to only six characters.

who had been teaching at the Law School since 1927. I admired the care with which Bob worked with his faculty members to encourage and inspire them to achieve academic excellence. He also had the wisdom to appoint a businessman as Associate Dean for Financial Affairs. Jack Hanley administered the financial affairs under Bob's guidance, and the law school was a very profitable division of the University. During the years I served with Bob, faculty meetings were uniformly congenial and supportive, and he was masterful at seeking and obtaining compromise and consensus. His faculty was his family, and he nurtured and supported them like a parent. I never knew him to make a commitment that he could not fulfill, and he insisted that the University Administration provide resources for his faculty and administrators to thrive.

In the administration of a law school, Bob Yegge was both an innovator and a visionary. He pioneered diversity in the law school population, and began preparatory programs for Hispanic students to encourage and prepare them for the rigors of their legal education. He knew that diversity in the student body was necessary to bring real-world experiences into the classroom. Programs copying the Yegge model were adopted in other law schools nationally. Today, the Sturm College of Law celebrates leading statistics for diverse classes, and many students seek their legal education here precisely because of the diverse student body. The Law School also boasts that an early participant in Yegge's innovative diversity program, Patricio Serna, became the Chief Justice of the New Mexico Supreme Court.

Under Yegge's deanship, the Law School began experimenting with interdisciplinary education and the curriculum included a series of courses that involved faculty from other colleges at the University. Over the years, the variety of interdisciplinary offerings at the Law School expanded and many students realized that their legal education could be significantly supplemented with the study of other disciplines. Some forty years later, the Sturm College of Law has adopted a strategic plan for its law curriculum that highlights an extensive component of interdisciplinary courses and the desirability of an interdisciplinary approach to the practice of law.

One of Bob Yegge's greatest contributions to the legal profession was his leadership in establishing the master's degree program in Judicial and Legal Administration ("MSJA/MSLA"). Over thirty-five years ago, Bob recognized the need to develop law-related professions and occupations, particularly with respect to court and law firm administration. Together with Professor Harry Lawson, Bob created a curriculum to train professional court managers and administrators. Their work was recognized in a national program sponsored by the American Bar Association that led to the creation of the Institute of Court Management, which Yegge graciously (and cleverly) agreed to host at the University of Den-

ver. His own words illustrate his visionary attitude toward the utility of this unique course of study:

The philosophy of judicial administration at DU has been, and still is, that a number of disciplines, besides law, have valuable roles in determining what justice is, the factors affecting it, how you get it, how you know when you get it, and how you keep it. In short, the general political, social, and economic environment in which a judicial system or court functions constitutes the proper subject matter of judicial administration in the broadest sense.³

Bob's commitment to orderly and competent judicial administration produced a star in the crown of the University of Denver as the MSJA/MSLA degree program has been a model for other programs in the burgeoning industry of judicial and law firm administration throughout the country. In many ways, this innovative, comprehensive program is Bob's legacy to the legal profession and the courts, allowing lawyers and judges to do their jobs while interdisciplinary-trained court and law firm administrators manage the business of justice.

When it came to selecting and supporting a faculty, pioneering programs to ensure a diverse student body, developing interdisciplinary legal education, and creating an innovative curriculum for law firm and court administrators, it is not difficult to describe Bob's contribution. Paraphrasing his own words, he knew what it was, he knew how to get it, he knew it when he had it, and he knew how to keep it.

As we miss Bob as a great friend, we will also miss him greatly as a colleague.

3. Robert B. Yegge, *Thirty-five Years and Still Counting*, 26 JUST. SYS. J. 186, 187 (2005).

ROBERT B. YEGGE—A REMEMBRANCE

VED P. NANDA[†]

Dean Emeritus Robert B. Yegge will be long remembered for his outstanding accomplishments. During his incredibly productive life, he managed to create a lasting legacy, not only at his alma mater, the University of Denver Sturm College of Law, but for legal education and the legal profession, as well. And that is not all, for the range and scope of his activities covered a much broader terrain. From serving as an honorary trustee at the Colorado Academy and on the National Science Foundation and the Luce Foundation committees, he led a host of civic and community organizations. All the while, he was generous to a fault and touched many lives. He left a large circle of friends who will sorely miss him.

I.

In the fall of 1965, Bob Yegge, just thirty-one years old became acting dean when he succeeded Harold Hurst. That was the year when I joined the College of Law faculty as a rookie from New Haven. I was new to Denver and had informed some of the University of Denver ("DU") faculty who interviewed me that I intended to keep my options open after a year, as I had offers from other schools on the East Coast that were willing to wait for me for a year if I wished to relocate.

After graduating *magna cum laude* from Princeton University and earning an M.A. (Sociology) and J.D. from DU, Bob had started teaching at DU as an instructor in Law and Sociology (1959-62) and as an adjunct associate professor and director of the Administration of Justice Program (1962-65). After serving a year as acting dean, Bob became Dean, the youngest law dean in the United States. He served in that capacity until 1977, when he was named Dean Emeritus.

Bob Yegge brought dynamism and excitement to the College of Law during his term as acting dean. He asked the faculty to closely examine the traditional legal curriculum and embarked on the process of introducing interdisciplinary studies to enrich the curriculum by systematically adding the fields of sociology, economics, general semantics, and international relations.¹ He identified goals and tasks for the school: that

[†] Vice Provost and Evans University Professor, University of Denver; Thompson G. Marsh Professor of Law and Director of the International Legal Studies Program, University of Denver Sturm College of Law.

1. See Robert B. Yegge, *Our Diamond in Rough*, 44 DENV. L.J. 307, 309 (1967) [hereinafter Yegge, *Our Diamond in Rough*].

it "should be a place for teaching the accumulated tradition of the law and further teaching about what the practitioner of the future might expect to encounter"; that it should be a research center that encourages and supports "research necessary to maintain our legal institutions and our profession in the stormy years ahead"; and that it should be "a leader in community involvement and community action."²

He shared his vision with faculty and students, who were equally inspired as he undertook the mission of achieving these goals deliberately, boldly, and with passion. He selected eminent scholars and creative minds from all over the country to attract to DU and proposed innovative programs in the Administration of Justice, Trial Advocacy, and Natural Resources, among others. These were promising new developments and he began his efforts in earnest toward moving a very good regional law school to the ranks of first-rate national law schools. His enthusiasm was infectious, and the practical steps he had already taken sufficed for me to decide to stay in Denver for a while; and I am still here, never regretting the decision to stay.

The next several years were indeed stimulating. In a couple of years Bob doubled the number of full-time faculty from thirteen to twenty-six. Among the notable new faculty members were William M. Beaney, who held the endowed William Nelson Cromwell law professorship at Princeton University, chaired Princeton's political science department, and was one of the nation's best-known authorities in Constitutional Law; H. Laurence Ross, who chaired the department of Sociology and Anthropology at New York University; and Wilbert Moore, President of the American Sociological Association. Christopher H. Munch, who was a professor and chairman of the Department of Law at the United States Air Force Academy, joined as Bob's associate dean.

During the summers of 1967 and 1968, Bob revisited the academic programs of the College of Law, bringing members of the bench, bar, and the community concerned with legal education, along with the involved faculty and students, to begin long-range planning for several programs, including the Administration of Justice, Business Planning and Taxation, International Legal Studies, Natural Resources, Professional Responsibility, Urban Affairs, clinical programs, and dual degrees. During the 1967-68 school year, several alumni activities were centered on the theme of the 75th anniversary of the College of Law, "The Responsible Professional in a Changing Society." In the fall of 1967, the activities focused on "The Professional as a Keeper of Law," while the focus for the winter of 1968 focus was on "The Professional as a Creator of Law," and spring 1968 on "The Professional as Administrator of Law."

2. Report of the College of Law 1967-68 to the Chancellor of the University of Denver 1 (1968) (on file with *Denver University Law Review*).

Several conferences were held, including one jointly sponsored with the American Council of Education on "Legal Aspects of Student-Institutional Relationships" and another co-sponsored with the American National Red Cross and the American Society of International Law on "Humanitarian Law."

In 1968, Dean Yegge reported that the College of Law had joined Harvard, Yale, Northwestern, Columbia, the University of Chicago, the University of Wisconsin, and the University of California at Berkeley in "having the largest amount of grant and contract research in American legal education."³ The College of Law was designated as one of the Russell Sage Foundation centers for the study of Law and Society, along with Harvard and Yale Law Schools as the newest such centers.⁴ That year the United States Office of Education gave to the College of Law its first ever grant to any American law school for a study on improvement of the legal curriculum.⁵

The College of Law developed dual degrees with other academic units of the University to gain depth of interdisciplinary knowledge through concentrated course work and independent research in specific subject areas identified for concentrated legal studies. These areas were administration of justice, natural resources, international law, and business planning, leading to J.D. and M.A. degrees in such subjects as Sociology, Psychology, Economics, Political Science, International Studies, and Geography, and J.D. and M.B.A. and J.D. and M.P.A. (Public Administration and Judicial Administration) degrees.⁶ With a grant from the Walter E. Meyer Research Institute of Law and the Russell Sage Foundation, the Association of American Law Schools and the Law and Society Association designated the University of Denver College of Law to conduct its first summer institute entitled "Social Science Methods in Legal Education" ("SSMLE") in 1967. These SSMLE institutes gave the College of Law singular national prominence. The goal was to train experienced law professors from across the country under the direction of eminent legal and social science educators in innovative law teaching methods and concepts.⁷

Bob Yegge stated that during his first year as dean the emphasis was on building faculty strength⁸ and that the task of the College of Law was to train lawyers who "by their contact with the main currents of legal and social thought, will have gained the power of analysis, the power of judgment, and the devotion to rational inquiry which are the precious possessions of those who are not prisoners of their time and place . . .

3. *Id.* at 6.

4. *Id.*

5. *Id.* at 7.

6. *Id.*

7. Yegge, *Our Diamond in Rough*, *supra* note 1, at 314-15.

8. *Id.* at 315.

[and] true professionals who will continue to learn throughout their lives.”⁹ During the 1970s he assiduously attended to the task of assembling gifted teachers and known scholars who shared and skillfully implemented his goal of training lawyers as “true professionals.”

His successful efforts from 1965-70 to strengthen and enhance the clinical programs at the College of Law and to establish an enduring partnership between law and behavioral sciences led Bob to explore in 1970 a similar partnership between law and pure sciences. He noted that College of Law students who had worked with those in other disciplines and had benefited from the College’s “systematic fusion of social science methods and knowledge into the legal curriculum,” had come to the realization that “law is inadequate to handle all social problems.”¹⁰ He made this statement in his introduction to a symposium issue of the *Denver Law Journal* based on papers from a conference of experts in science, technology, and the law whom Dean Yegge had gathered at the College to explore the possibilities and to “engage[] critically and constructively in the business of considering the implications of science [and] technology on legal process.”¹¹

Bob Yegge had initiated an innovative diversity program that my colleagues John Moye and Pat Serna have so eloquently described in their tributes. And he had instituted the path-breaking MSJA/MSLA program, also highlighted in John Moye’s tribute. The College of Law became the academic home of the newly-created Institute of Court Management, the product of an American Bar Association-Johnson Foundation task force formed in response to Chief Justice Warren E. Burger’s call that ten or twelve of “the best informed people in this country [should] plan a program to train the large number of [professional court] managers [and administrators].”¹² Robert Yegge, then a member of the board of directors of the American Judicature Society, was one of those selected in that group.

Among the numerous other programs and projects that blossomed under Bob Yegge’s leadership, I will mention here only three—the International Legal Studies Program, the Natural Resources Program, and the Master in Taxation Program. The planning sessions of the ILSP at Yegge Peak—where laughter and joyful camaraderie mingled with serious discussion—are legendary. The participants still recall those special times with great delight.

Bob Yegge completed his term as a highly successful and effective Dean. His twelve years at the helm of the College of Law had led to the

9. *Id.* at 307.

10. Robert B. Yegge, *The Implications of Science-Technology for the Legal Process -- Introduction*, 47 *DENV. L.J.* 549, 552 (1970).

11. *Id.* at 551.

12. Robert B. Yegge, *Thirty-Five Years and Still Counting*, 26 *JUST. SYS. J.* 186, 187 (2005).

realization of his dream—he indeed had transformed a very good regional law school into a great national law school. In addition to these many contributions to the College, Bob acquired special gifts from lawyer-philanthropist Frank H. Ricketson, Jr., and broadcasting legend Lowell Thomas, which enabled the school to move to the Park Hill campus in 1984.

II.

Bob did not sit on his laurels after he became Dean Emeritus. He continued to teach and write with undiminished zeal and energy as a professor of law. And when the University again called on him to lead the College he cheerfully answered the call and assumed decanal duties during 1997-98. Among his interests was the new field of preventive law, which he strongly advocated. He served as Vice-President and Executive Director of the National Center for Preventive Law at the DU College of Law, which then Dean Edward A. Dauer and his collaborator, Professor Louis M. Brown, had established as a non-profit organization for the advancement of research, teaching, and practice in the field of preventive law.

He continued to be prominently engaged in a plethora of professional activities. He chaired several boards and served as a member and in an advisory capacity on numerous boards and editorial boards, including those of the American Bar Association, National Center for State Courts, American Judicature Society, National Council for Arts and Education, Law and Society Association, the Henry Luce Foundation, and the American Foundation for Temple Bar. He received dozens of national and international honors and awards recognizing his achievements and contributions.

III.

In spite of his demanding professional commitments Bob Yegge still had time to become deeply involved in service to the community. He chaired the boards of several distinguished civic organizations and served on many others. These included the Colorado Council on the Arts and Humanities, Mile-High Chapter of the American Red Cross, the Colorado Prevention Center of the University of Colorado Health Sciences Center, Denver Urban Observatory, Colorado Legal Education Program, Metropolitan Denver Legal Aid Society, Colorado Legal Services, Colorado Academy, and an organization that held a special place in his heart, the Denver Dumb Friends League.

IV.

On a personal note, Bob was a dear and close friend. He was my daughter, Anjali's, godfather. His mother, Fairy, considered me as her son. I vividly recall a dinner at a Japanese restaurant where Bob, Fairy,

and I were together when Fairy called me, as she used to do, "son." The Japanese waitress looked at us in surprise and asked Fairy, "Are these your sons?"—Bob, pale and blonde, and I a deep brown. The waitress, without missing a beat, said, "Ha! I see—the same noses!"

My wife, Katharine, and I particularly relished the opportunity to travel in India with Bob as part of an educational trip I was leading, seeing Bob totally at home, as always, yet in a very new and foreign setting.

In January this year Bob was supposed to address the Association of American Law Schools' annual meeting in Washington, DC. His friends expressed their shock and grief to me, as have so many in this city who still can't believe that his booming laughter and his fond "Hi, Kiddoes," will never be heard again.

Bob's Christmas parties, his Santa Claus outfit, his constant efforts to make others happy, are some of the many special traits that I will always remember. I cannot forget Bob's days in the hospital during his illness. Every day I would hope that things would improve—and every day he and I would say that he was going to beat the harsh reality that so slowly became apparent. And even his surgeon, Dr. Craig Brown, practically broke down when he told us Bob wasn't going to make it. These are some of the indelible imprints on my mind that I continue to recall.

Bob was a man of resolute character, courageous and resilient beyond belief. He never lost his sense of humor. As I said above, he was generous to a fault, selfless, and loyal. Time and again you could hear the tender care for others expressed in a matter-of-fact way that was pure Bob. He will always remain a role model for me and for countless others.

THE TENTH CIRCUIT REJECTS SELECTIVE WAIVER:
*QWEST COMMUNICATIONS INTERNATIONAL, INC. SECURITIES
LITIGATION*

NANCY J. GEGENHEIMER[†]

INTRODUCTION

On June 19, 2006, the United States Court of Appeals for the Tenth Circuit decided *In re Qwest Communications International, Inc.*¹ Accepting a Writ of Mandamus,² the court declared that the writ, “presents an issue of first impression in this Circuit, namely, whether Qwest waived the attorney-client privilege and work-product doctrine, as to third-party civil litigants, by releasing privileged materials to federal agencies in the course of the agencies’ investigation of Qwest.”³ During the course of investigations by the United States Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”), Qwest had turned over approximately 200,000 privileged documents “pursuant to a written confidentiality agreement between Qwest and each agency.”⁴ Those documents, in turn, had been introduced into evidence in criminal trials, produced in three separate criminal proceedings, and used as exhibits in SEC investigative testimony.⁵

In upholding the district court, which had in turn upheld the recommendation of the Magistrate Judge, the Tenth Circuit joined the majority of other circuits⁶ in refusing to allow a selective disclosure of privileged or work-product documents without the resulting waiver of the privilege or protection.⁷

In a 2005 Seton Hall Law Review article, the author, Andrew McNally, argued for the revitalization of the selective waiver to encour-

[†] Nancy Gegenheimer is a partner with Holme Roberts & Owen LLP. She received her B.A. from the University of Colorado, 1975; and J.D. from the University of Denver, 1978.

1. *In re Qwest Commc’ns Int’l, Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 584 (Nov. 13, 2006).

2. 28 U.S.C.A. § 1651(a) (West 2007).

3. *Qwest*, 450 F.3d at 1181.

4. *Id.*

5. *Id.* at 1194.

6. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 688 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. The Republic of the Phil.*, 951 F.2d 1414, 1431 (3d Cir. 1991); *The Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981).

7. *Qwest*, 450 F.3d at 1200.

age voluntary disclosure of corporate wrongdoing.⁸ As of May 15, 2006, the Advisory Committee on Evidence Rules submitted proposed new evidence Rule 502.⁹ Proposed Rule 502(c) addresses selective waiver.¹⁰

This article first lays out the history of the attorney-client privilege and work-product protection. Secondly, it sets out the landscape of the government agency policies informing Qwest's actions, and thirdly, it discusses the case law on selective disclosure starting with the Eighth Circuit's opinion in *Diversified Industries, Inc. v. Meredith*.¹¹ This article then discusses the Tenth Circuit's opinion in *Qwest* and the proposed new evidence Rule 502 and concludes with a discussion of what lies ahead for selective waiver of the privilege.

I. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileges known to common law.¹² Initially, the privilege worked only one way, prohibiting attorneys from revealing their client's secrets.¹³ But the privilege quickly expanded to communications that went either way between lawyers and clients.¹⁴ The scope of the privilege is "governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."¹⁵ Federal Rule of Evidence 501 ("FRE 501") provides:

Except as otherwise required by the Constitution of the United States or provided by act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state, or

8. Andrew J. McNally, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure Of Corporate Wrongdoing By Restricting Third-Party Access To Disclosed Materials*, 35 SETON HALL L. REV. 823, 844 (2005).

9. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF ADVISORY COMMITTEE ON EVIDENCE RULES (2006), available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>.

10. FED. R. EVID. 502 (Proposed Draft 2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4.

11. 572 F.2d 596 (8th Cir. 1977) (en banc).

12. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

13. See *Berd v. Lovelace*, (1577) 21 Eng. Rep. 33 (Ch.).

14. *Bolton v. Corporation of Liverpool*, (1833) 39 Eng. Rep. 614, 615 (Ch.); THE HONORABLE DICK THORNBURGH, WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE: A BALANCED APPROACH, WASHINGTON LEGAL FOUNDATION 6 n.8 (2006).

15. FED. R. EVID. 501; *United States v. Zolia*, 491 U.S. 554, 562 (1989).

political subdivision thereof shall be determined in accordance with state law.¹⁶

The Federal Rules of Evidence are statutory in nature because they “were passed by both houses [of Congress] and signed into law by the President.”¹⁷ This differs from the Federal Rules of Civil Procedure, which were promulgated under the Rules Enabling Act.¹⁸ A rule on privilege cannot be made effective through the ordinary rulemaking process. Congress must enact such a rule through its authority under the Commerce Clause.¹⁹

The attorney-client privilege provides that:

(1) where legal advice of any kind is sought (2) from a professional adviser in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or his legal adviser (8) except if the protection be waived.²⁰

The purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”²¹ The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon lawyers being fully informed by their clients.²² The protection of the privilege extends only to communications and not to facts,²³ and the purpose of the communication must be for legal advice.²⁴

There are complications in the application of the privilege when the client is a corporation because the corporation is an artificial creature and

16. FED. R. EVID. 501.

17. Act of Jan. 2 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (establishing an appendix for rules of evidence); Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1788 (1994).

18. See Pub. L. No. 73-415, 48 Stat. 264 (codified at 28 U.S.C.A. § 2072 (West 2007)).

19. 28 U.S.C.A. § 2074(b) (West 2007).

20. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 683, 684 (1st Cir. 1997); accord 8 WIGMORE ON EVIDENCE § 2292 (McNaughton Rev. 1961); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (providing the “privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar or a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client; (b) without the presence of strangers; (c) for the purpose of securing primarily either (i) an opinion on law; or (ii) legal services or (iii) assistance in some legal proceedings and not (a) for the purpose of committing a crime or tort; and (iv) the privilege has been (a) claimed and (b) not waived by the client”).

21. *Upjohn*, 449 U.S. at 389.

22. See *id.*

23. See *id.* at 395.

24. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977); *Underwater Storage, Inc. v. U.S. Rubber Co.*, 314 F. Supp. 546, 548 (D.D.C. 1970); *In re Natta*, 264 F. Supp. 734, 741 (D. Del. 1967); *Georgia-Pacific Plywood Corp. v. U.S. Plywood Co.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956).

not an individual.²⁵ Nonetheless, there is no question that the privilege applies when the client is a corporation.²⁶ One difficulty with the privilege when it relates to a corporation is determining whether or not the communication is actually between an attorney and a client for purposes of legal advice.²⁷ In light of the vast and complicated array of regulatory legislation confronting modern corporations, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law.²⁸ The privilege is also difficult in the corporate context because the restriction on privilege is that it must be legal advice, not business advice.²⁹ The privilege belongs to the corporation, not to individuals.³⁰

This difficulty in applying the attorney-client privilege in the corporate setting is reflected in the nearly twenty-year period wherein the courts struggled with the control group test and who, in fact, was entitled to claim a privileged communication.³¹ In 1981, the Supreme Court took the issue up and recognized, citing ethical considerations, that a lawyer must be fully informed of the facts and must be able to predict with some degree of certainty whether particular discussions will be protected.³² The Court explained, "In a corporation it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel."³³

But all testimony exclusionary rules, including the attorney-client privilege, contravene the fundamental principle that the public has a right to every person's evidence.³⁴ As a result, privileges are strictly construed and only accepted to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascer-

25. See *Upjohn*, 449 U.S. at 389-90.

26. See *Radiant Burners, Inc. v. Am. Gas Assoc.*, 320 F.2d 314, 323 (7th Cir. 1963); *Upjohn*, 449 U.S. at 389-90 (citing *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915)).

27. See *Meredith*, 572 F.2d at 608.

28. See *Upjohn*, 449 U.S. at 392 (citing Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. 901, 913 (1969)).

29. See *Calvin Klein Trademark Trust*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

30. See *Upjohn*, 449 U.S. at 391-92.

31. See *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962); *Upjohn*, 449 U.S. at 389-90.

32. *Upjohn*, 449 U.S. at 389, 391-93.

33. *Id.* at 391 (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc)).

34. See *United States v. Nixon*, 418 U.S. 683, 709 (1974); *United States v. Bryan*, 339 U.S. 323, 331 (1950); *In re Keeper of the Records of XYZ Corp. v. United States*, 348 F.3d 16, 22 (1st Cir. 2003).

taining the truth.³⁵ The privilege is not limitless and courts take care to apply it only to the extent necessary to achieve its underlying goals.³⁶

A party who invokes the privilege has the burden of establishing that it applies to the communication at issue.³⁷ That party also has the burden to prove that it has not been waived.³⁸ Just like the attorney-client privilege, questions of waiver of privilege are governed by federal common law.³⁹

The attorney-client privilege can be waived expressly and impliedly, and both are equally binding.⁴⁰ Professor Weinstein explains:

[T]he courts have identified a common denominator in waiver by implication. In each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the Court found that to allow the privilege to protect against disclosure of that information would have been unfair to the opposing party.⁴¹

A client impliedly waives the privilege when the client (1) testifies concerning a portion of an attorney-client communication; (2) places attorney-client relationship itself at issue; or (3) asserts reliance on advice of counsel as an element of a claim or defense.⁴² On the other hand, express waivers include: (1) express and voluntary surrender of the privilege; (2) partial disclosure of a privileged document; (3) selective disclosure to some outsiders but not all; or (4) inadvertent over-hearings or disclosures.⁴³

When a party defends its actions by disclosing an attorney-client communication, it waives the attorney-client privilege as to all such communications regarding the same subject matter.⁴⁴ But an extrajudicial disclosure, not used to gain adversarial advantage in judicial proceedings is not an implied waiver of all communications on the same

35. See *Elkins v. United States*, 364 U.S. 206, 216 (1960) (arguing that the benefit behind the exclusionary rule is the public good of deterring police misconduct which outweighs the traditional principles of using all available evidence in seeking the truth).

36. *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001).

37. See *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1972).

38. See *Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 71 (1st Cir. 2002); *United States v. Bollin*, 264 F.3d 391, 412 (4th Cir. 2001).

39. See *United States v. Rakes*, 136 F.3d 1, 3 (1st Cir. 1998).

40. *The Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

41. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN FEDERAL EVIDENCE* § 503-41[1] (Joseph M. McLaughlin Ed. 1977); cf. *Keeper of the Records of XYZ Corp.*, 348 F.3d at 22.

42. *Keeper of the Records of XYZ Corp.*, 348 F.3d at 24.

43. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 684 (citing MCCORMICK ON EVIDENCE, § 93 at 341-48 (J.W. Strong ed., 4th ed. 1992)).

44. See *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005).

subject.⁴⁵ There are other well-established waivers, not involved in *Qwest*.⁴⁶

II. WORK PRODUCT DOCTRINE

The work product doctrine is a protection, not a privilege.⁴⁷ It has its genesis in the Supreme Court's opinion in *Hickman v. Taylor*,⁴⁸ decided in 1947. Unlike the attorney-client privilege, which protects all types of communications, both oral and written, the work-product doctrine protects documents and tangible things that are both privileged and non-privileged if prepared in anticipation of litigation.⁴⁹ The work-product doctrine is now codified in the Federal Rules of Civil Procedure. The rule provides:

Subject to the provisions of Subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.⁵⁰

The rule specifically protects against disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation. Thus, the work-product

45. *Keeper of the Records of XYZ Corp.*, 348 F.3d at 24.

46. Other waivers include a crime-fraud exception. See *Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986) (citing *Clark v. United States*, 289 U.S. 1, 15 (1933)) ("All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud."); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038 (2d Cir. 1984); *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1997). Another exception is joint defense or communications with co-defendants. See *Westinghouse Elec. Corp. v. The Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991). Another exception not at issue is when a disclosure to a third party is necessary for the client to obtain informed legal advice. See *Westinghouse Elec. Corp.*, 951 F.2d at 1424. By *Qwest's* admission at oral argument, inadvertent disclosure was not an issue. *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 450 F.3d 1179, 1182 (10th Cir. 2006), cert. denied, 127 S. Ct. 584 (Nov. 13, 2006); *accord Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1417 (Fed. Cir. 1997) (permitting some disclosure of confidential information without resulting in an inadvertent waiver).

47. Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917 (1983).

48. 329 U.S. 495 (1947).

49. *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005); *In re Echo Star Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed. Cir. 2006).

50. FED. R. CIV. P. 26(b)(3).

doctrine encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not be able to rob them of the fruits of their labor.⁵¹ “The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary’s preparation.”⁵²

The work has to be prepared in anticipation of litigation, but actual litigation does not have to be filed, in fact, it does not even have to be true litigation.⁵³ For example, a summons from a department of the government qualifies as anticipation of litigation.⁵⁴ The courts recognize that prudent parties anticipate litigation and begin preparation prior to the time a suit is formally commenced. The test that is applied is “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared for or obtained because of the prospect of litigation.”⁵⁵ But there is no work-product protection for documents prepared in the regular course of business, or to satisfy public requirements unrelated to litigation, or for other non-litigation purposes, even if those documents are prepared while litigation is a prospect or ongoing.⁵⁶

Like the attorney-client privilege, there are strong policies behind the work-product doctrine.⁵⁷ The attorney-client privilege protects the attorney-client relationship and the legal system, and the work-product doctrine is said to protect the adversary system.⁵⁸ In some respects, the work-product doctrine is not only different, but it is also broader than the attorney-client privilege.⁵⁹ The protection given work product by the Rule is broader in the sense that it may be, but need not be, work of an attorney, and work product is not confined to information or materials gathered or assembled by an attorney.

Hickman v. Taylor distinguished between opinion and non-opinion work product and this distinction is followed in the Rule.⁶⁰ “[A] showing of necessity is sufficient to overcome” the work-product protection when documents “do not contain opinion work product, i.e., writings which

51. See *Hickman*, 329 U.S. at 510-11; *Echo Star Commc'ns*, 448 F.3d at 1301.

52. *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995).

53. See *In re Steinhardt Partners*, 9 F.3d 230, 234 (2d Cir. 1993) (providing that the “presence of an adversarial relationship does not depend on the existence of litigation”).

54. See *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981) (Internal Revenue Service summons is anticipation of litigation).

55. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, 8 FEDERAL PRACTICE & PROCEDURE §§ 2017, 2021-28 (West 2006); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006).

56. WRIGHT, MILLER & MARCUS, *supra* note 55, § 2024; *Roxworthy*, 457 F.3d at 593.

57. *E.g.*, *United States v. Nobles*, 422 U.S. 225, 236-37 (1975).

58. See *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1428 (3d Cir. 1991).

59. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002).

60. See *Hickman*, 329 U.S. at 510-512.

reflect an attorney's mental impressions, conclusions, opinions or legal theories."⁶¹ Likewise, the rules as to waiver of work product differ slightly from attorney-client privilege.⁶² Not every disclosure of work product necessitates a waiver. Instead, the disclosure must be to an adversary. Courts distinguish disclosure of work product to adversaries and non-adversaries.⁶³

Thus, waiver of work product will occur if there is a disclosure to an adversary,⁶⁴ and similar privilege waivers,⁶⁵ such as the crime-fraud waiver, also apply to work product.⁶⁶ Because the waiver of attorney-client privilege and work-product protection differs, there are cases where the same conduct resulted in a waiver of the privilege but not work product.⁶⁷

III. FACTUAL SETTING OF *QWEST COMMUNICATIONS* CASE

In early 2002, the SEC began investigating Qwest's business practices.⁶⁸ In the summer of 2002, Qwest learned that the DOJ had also commenced a criminal investigation of Qwest.⁶⁹ In those investigations, Qwest produced 220,000 pages of documents that were protected by the attorney-client privilege and work-product doctrine.⁷⁰ Qwest also withheld 390,000 pages of privileged documents.⁷¹

Prior to the initiation of the federal investigations, the plaintiffs had filed civil actions against Qwest that involved many of the same issues as the investigation.⁷² In the civil cases, Qwest produced millions of pages of documents, but withheld all of the privileged documents, including

61. *Westinghouse Elec. Corp.*, 951 F.2d at 1431.

62. *See* *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997).

63. *Westinghouse Elec. Corp.*, 951 F.2d at 1428; *see also* *Mass. Inst. of Tech.*, 129 F.3d at 687; *Columbia/HCA Healthcare Corp. Billing Practices*, 293 F.3d at 305-06.

64. *In re* *Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988) (quoting *Grumman Aerospace Corp. v. Titanium Metals Corp. of Am.*, 91 F.R.D. 84, 90 (E.D.N.Y. 1981)); *Grumman Aerospace Corp.*, 91 F.R.D. at 90; *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Wash.*, 103 F.R.D. 52, 67 (D.D.C. 1984).

65. *See supra* note 46.

66. *In re* *Antitrust Grand Jury*, 805 F.2d 155, 164 (6th Cir. 1986); *In re* *Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982).

67. *See, e.g.*, *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Steinhardt Partners*, 9 F.3d at 236; *In re* *Subpoena Duces Tecum*, 738 F.2d 1367, 1375 (D. C. Cir. 1984); *Picard Chemical Inc. Profit Sharing Plan*, 951 F. Supp. 679, 689 (W.D. Mich. 1996); *Shields v. Sturm, Roger & Co.*, 864 F.2d 379, 383 (5th Cir. 1989); *In re* *Martin-Marietta Corp.*, 856 F.2d 619, 624-26 (4th Cir. 1988).

68. *In re* *Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1181 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (Nov. 13, 2006).

69. *Qwest*, 450 F.3d at 1181.

70. *Id.*

71. *Id.*

72. *Id.* at 1182.

those that it had produced to the SEC and the DOJ.⁷³ Qwest disclosed the withheld documents on a privilege log, as it must.⁷⁴

Qwest had a written agreement with the SEC to maintain the confidentiality of the documents and to not disclose them to any third party, except to the extent staff determines that disclosure is otherwise required by law or would be in furtherance of the SEC discharge of its duties and responsibilities.⁷⁵ But Qwest agreed that the DOJ could share the documents with other state, local and federal agencies and that the DOJ could make direct or derivative use of the documents in any proceeding and in its investigation.⁷⁶ The DOJ agreed to maintain the confidentiality and not disclose the documents to third parties except to the extent that the DOJ determined that disclosure was otherwise required by law or would be in furtherance of the DOJ's discharge of its duties and responsibilities.⁷⁷ The confidentiality agreements with both the DOJ and the SEC were in writing.⁷⁸ But the documents, given the scope of the DOJ's permission, were introduced into evidence in criminal trials, were produced in discovery in three separate criminal proceedings, and used as exhibits to SEC investigative testimony.⁷⁹ The DOJ was not required to file these documents under seal, keep a record of how they were used or to deal with the documents in any special way.⁸⁰

Private parties in civil litigation found the documents identified on privileged logs and moved to compel.⁸¹ The Magistrate Judge held that Qwest had waived the attorney-client privilege and work-product protection by producing the documents.⁸² The District Court upheld the Magistrate Judge's order compelling production and required further production of certain reports prepared by Qwest's counsel, redacted of attorney opinion work product.⁸³ The order to disclose the redacted version of counsel's report was not challenged in the Tenth Circuit.⁸⁴ The district court stayed its order pending outcome of the writ of mandamus.⁸⁵

73. *Id.*

74. *See* Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-42 (10th Cir. 1984) (providing that a party seeking to assert the privilege must make a clear showing that it applies); FED. R. Civ. P. 26(b)(5); FED. R. CIV. P. 34.

75. *See Qwest*, 450 F.3d at 1181.

76. *Id.*

77. *Id.* at 1181-82.

78. *Id.* at 1181.

79. *Id.* at 1194.

80. *Id.*

81. *See id.* at 1182.

82. *Id.* There was no issue of inadvertent disclosure or involuntary waiver in the *Qwest* case. *Id.* Also, there was no issue of waiver of opinion work product. *Id.*

83. *Id.* at 1182.

84. *See id.*

85. *Id.*

IV. LANDSCAPE REGARDING FEDERAL AGENCIES' POLICIES FACED BY QWEST

At the time that the DOJ and the SEC began investigations of Qwest, there were years of precedent where corporations waived the privilege to either: (1) not be labeled uncooperative; or (2) secure leniency during an investigation. Both the DOJ and the SEC have written policies regarding waiver of attorney-client privilege.

A. Department of Justice

The DOJ has a corporate leniency policy for antitrust violations.⁸⁶ With respect to leniency before any investigation has begun, the DOJ policy includes, as one of its six conditions: "The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation."⁸⁷ With respect to all of its investigations, the DOJ is also guided by its principles of Federal Prosecution of Corporations, which appeared in a memorandum from Deputy Attorney General Eric Holder and provided guidance to prosecutors about whether to prosecute a corporation.⁸⁸ The memorandum was not made public at the time that Deputy Attorney General Holder issued it. The memorandum attaches guidelines titled Department's Federal Prosecution of Corporations (the "Guidelines").⁸⁹ The memorandum emphasizes that the factors laid out in the Guidelines are not outcome determinative and are for guidance only. Prosecutors are not required to reference the factors or document the weight they accorded specific factors in reaching their decision.⁹⁰ In setting out factors to be considered in charging corporations, the Holder Memorandum states that, in general, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals.⁹¹ The Guidelines go on to state, however, that due to the nature of the corporate "person" some additional factors are present.⁹² For example, one of those factors is: "The Corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the cor-

86. See Dep't of Justice, Corporate Leniency Policy (August 10, 1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>.

87. *Id.* This is also a policy for individuals. See *id.*

88. See Memorandum from Deputy Att'y Gen. Eric Holder Jr. on Bringing Criminal Charges Against Corps. to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

89. *Id.* [hereinafter Guidelines] ("Guidelines" refers to the Federal Prosecution of Corporation guidelines attached to the Holder Memorandum).

90. See Holder Memorandum, *supra* note 88.

91. See Guidelines, *supra* note 89, § II.A.

92. *Id.*

porate attorney-client and work product privileges (see section VI, *infra*).⁹³

Section VI of the Guidelines then addresses whether a corporation's voluntary disclosure was sufficient.⁹⁴ The section discusses the importance of the completeness of disclosure and that it will be a factor weighed in assessing the adequacy of the corporation's cooperation.⁹⁵ The disclosure may include waiver of attorney-client and work-product protections with respect to its internal investigation and its communications with its officers, directors, and employees of counsel.⁹⁶ The Guidelines provide that prosecutors may therefore request a waiver in appropriate circumstances.⁹⁷ The government recognized that waiver by the corporation may be the only way the government could get the statements of possible witnesses, subjects, or targets.⁹⁸ The Guidelines state:

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigations and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.⁹⁹

The Guidelines imply that the government may consider a corporation not cooperative if it enters into joint defense agreements with its officers, directors or employees or continues to pay and advance their attorneys' fees, unless required to do so by law, or otherwise supports culpable employees.¹⁰⁰

In a November 2003 interview published in the United States Attorneys Bulletin, United States Attorney James B. Comey stated that because of an individual's rights to invoke the Fifth Amendment, the internal investigation and notes of counsel during an internal investigation may be the only way for the government to get to certain facts.¹⁰¹ United States Attorney Comey reiterated in this 2003 interview that:

93. *Id.* § II.A.4.

94. *See id.* § VI.

95. *See id.*

96. *Id.* § VI.B.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.*

101. *See* Interview by United States Attorneys Bulletin with James B. Comey, United States Attorney, 51 United States Attorney Bulletin No. 6, 4-5 (November 2003), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5106.pdf (regarding Department of Justice's policy on requesting corporations under criminal investigation to waive the attorney-client privilege and work product protection).

It is hard for me to understand why a corporation would ever enter into a joint defense agreement because doing so may prevent it from making disclosures it must make if it is in a regulated industry or may wish to make to a prosecutor. In any event, how a joint defense agreement will affect the corporation's ability to cooperate will vary in every case. If the joint defense agreement puts the corporation in a position where it is unable to make full disclosure about the criminal activity, then no credit for cooperation will be factored into the government's charge and decision, and it will get no credit for that cooperation under the guidelines.¹⁰²

Subsequent to the Holder Memorandum, in 2003 Deputy Attorney General Larry D. Thompson issued the "Thompson Memorandum."¹⁰³ Attached to the memorandum were revisions to Holder's *Principles of Federal Prosecution of Business Organizations*. The main focus of the revisions, according to the Thompson Memorandum, is to increase emphasis on and scrutiny of the authenticity of a corporation's cooperation.¹⁰⁴ He notes that:

Too often business organizations, while purporting to cooperate with a Department investigation, in fact takes steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions made clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address[ed] the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than a mere paper program[.]¹⁰⁵

The revision that addresses this focus appears in Section VI of the Thompson Memorandum, on collaboration and voluntary disclosure.¹⁰⁶ The revisions added that agreements for immunity or amnesty or pretrial diversion may be entered into only with the approval of each affected district or the appropriate department official.¹⁰⁷ Another factor was added into Section VI as follows:

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such

102. *Id.* at 4.

103. See Memorandum from Deputy Att'y Gen. Larry D. Thompson on Principles of Fed. Prosecution of Bus. Org. to Heads of Dep't Components United States Attorneys (June 20, 2003) [hereinafter Thompson Memorandum], available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

104. *Id.* at 1.

105. *Id.*

106. See *id.* at 6-8.

107. *Id.* at 6.

as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to properly disclose illegal conduct known to the corporation.¹⁰⁸

The Thompson Memorandum would have been issued during the investigations of Qwest.¹⁰⁹ The Justice Department sent out another memorandum on October 21, 2005 from Acting Deputy Attorney General Robert D. McCallum Jr. which provided that, to ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the Thompson Memorandum, each district was directed to establish a written waiver review process.¹¹⁰ The McCallum Memorandum acknowledged the fact that waiver review processes may vary from district to district (or component to component) so that each United States Attorney or Component retained the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations.¹¹¹

The Thompson Memorandum, like the Holder Memorandum, states that a corporation's offer of cooperation does not automatically entitle the corporation to immunity from prosecution.¹¹² It is merely one factor considered in conjunction with other factors. In fact, a waiver of the attorney-client privilege and cooperation will not even assure that a corporation will be given any leniency. Prosecutors must and do retain wide discretion in determining the charges to bring against a corporation and waiver of the privilege is just one of the factors.¹¹³

The Thompson Memorandum came under strong criticism from the Southern District of New York in *United States v. Stein*.¹¹⁴ In *Stein*, the district court found that provisions of the Thompson Memorandum relating to factors to weigh in determining whether the corporation appeared to be protecting its employees and agents, including through advancing

108. *Id.* at 8.

109. Compare *id.* at 1 (noting the Thompson Memorandum was issued on January 20, 2003), with *Qwest*, 450 F.3d at 1181 (noting the SEC and DOJ investigations of Qwest began in the summer of 2002). In *United States v. Stein*, 435 F. Supp. 2d 330, 364-65 (S.D.N.Y. 2006), the court held that portions of the Thompson Memorandum were unconstitutional violations of due process under the Fifth Amendment and the right to counsel under the Sixth Amendment.

110. Memorandum from Acting Deputy Att'y Gen. Robert D. McCullum, Jr., on Waiver of Corporate Attorney-Client and Work Product Protection to Heads of Dep't Components United States Attorneys (November 2005) [hereinafter McCallum Memorandum], available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf.

111. *Id.*

112. Compare Thompson Memorandum, *supra* note 103, at 1, with Holder Memorandum, *supra* note 88, § VI.

113. Thompson Memorandum, *supra* note 103, at 6.

114. 435 F. Supp. 2d 330, 363-65, 367-68 (S.D.N.Y. 2006).

attorneys' fees, were unconstitutional.¹¹⁵ The court held that they violated the due process clause of the United States Constitution.¹¹⁶

On December 12, 2006, Deputy Attorney General Paul J. McNulty issued new guidelines.¹¹⁷ In a memorandum to all Heads of Department Components, Deputy Attorney General McNulty states that the new memorandum supersedes and replaces guidance contained in the memorandum from Deputy Attorney General Larry D. Thompson entitled "Principles of Federal Prosecution of Business Organizations," dated January 20, 2003.¹¹⁸ However, as was the case when the Thompson Memorandum supplanted the Holder Memorandum, much of the Principles of Federal Prosecution of Business Organizations remain the same. What changed, however, was Section VII.¹¹⁹ Section VII of the McNulty Memorandum sets out specifics on how the value of cooperation will be treated in charging a corporation.¹²⁰

The McNulty Memorandum expressly states that waiver of attorney-client and work-product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation.¹²¹ The McNulty Memorandum goes on to state, "However, a company's disclosure of privileged information may permit the government to expedite its investigation A corporation's response to a government's request for waiver of privilege may be considered in determining whether a corporation has cooperated in the government's investigation."¹²² The McNulty Memorandum identifies two categories of information that can be requested, *seriatim*, from a corporation.¹²³ Category I must be requested first and entails purely factual information, which may or may not be privileged, relating to the underlying misconduct.¹²⁴ If the Category I purely factual information provides an incomplete basis to conduct a thorough investigation, prosecutors may then request Category II information.¹²⁵ Category II information includes attorney-client communications or nonfactual attorney-work product.¹²⁶ Such information in-

115. *Id.*

116. *Id.* at 365.

117. Memorandum from Deputy Att'y Gen. Paul J. McNulty on Principles of Fed. Prosecution of Bus. Org. to Head of Department Components United States Attorneys (December 12, 2006) [hereinafter McNulty Memorandum], available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

118. *Id.* at 2.

119. *Id.* at 7-12.

120. *Id.*

121. *Id.*

122. *Id.* at 8, 11.

123. *Id.* at 9-11.

124. *Id.* at 9.

125. *Id.* at 10.

126. *Id.*

cludes "legal advice given to the corporation before, during, and after the underlying misconduct occurred."¹²⁷

B. Securities and Exchange Commission

The SEC has its own rules, guidelines and criteria that will be considered if the SEC is to give credit for self-policing, self-reporting, remediation and cooperation. These are set forth in a release known as the "Seaboard Report" which came out in 2001.¹²⁸ Criteria No. 11 of the Seaboard Report is footnoted with the statement that in some cases the desire to provide information to the SEC staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections, and exemptions with respect to the SEC. Of the thirteen criteria, only Criteria No. 11 goes to the company's cooperation. It provides:

Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?¹²⁹

Section 307 of the Sarbanes-Oxley Act¹³⁰ directed the SEC to enact rules of professional responsibility for attorneys.¹³¹ These rules, as enacted, provide that with regard to the attorney-client privilege and work

127. *Id.*

128. See Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

129. *Id.*

130. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in sections of 15 U.S.C.A. § 7201 (West 2007)).

131. 15 U.S.C.A. § 7245. Section 307 of the Sarbanes-Oxley Act provides:

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

Id.

product doctrine, a lawyer is required to report "evidence of a material violation,"¹³² which is defined as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."¹³³ The Rule then goes on to provide that the attorney is supposed to report such material violations up the ladder to the chief legal counsel or chief executive officer.¹³⁴ The Rule instructs that confidential information can be disclosed by an attorney, to prevent commission of an illegal act that would be likely to perpetrate a fraud on the SEC or could cause substantial injury to the financial or property interests of the issuer.¹³⁵ While much broader rules had in the past been proposed, they were withdrawn.¹³⁶ The rules as enacted do not dramatically change the state of the law on attorney-client privilege. Many states already allow an attorney to reveal confidential information to prevent a crime or fraud.¹³⁷

C. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act (the "Act") was signed into law by the President on July 30, 2002.¹³⁸ The Act makes sweeping changes to the law applicable to public companies and their officers and directors. Its provisions are wide ranging and far beyond the scope of this article. With respect to attorney-client privilege, the SEC enacted professional responsibility rules for attorneys appearing while practicing before the SEC, as required by Section 307 of the Act.¹³⁹ These rules are discussed above.

The Act also includes broad whistle-blowing provisions. Section 806 of the Act amends Title 18 of the United States Code to protect employees of publicly traded companies against retaliation in fraud

132. 17 C.F.R. § 205.3(b)(1) (2006).

133. 17 C.F.R. § 205.2(e) (2006).

134. 17 C.F.R. § 205.3(b)(1) (2006).

135. 17 C.F.R. § 205.3(d)(2)(i)-(iii) (2006).

136. The SEC proposed a rule on selective waiver which read:

Where an issuer, through its attorney, shares with the Commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons.

Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,706 (Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205). In 1984, the SEC proposed to amend the Securities and Exchange Act of 1934 to establish a selective waiver but the proposal was never taken up by Congress. *SEC Oversight and Technical Amendments: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of The H. Comm. on Energy and Commerce*, 98th Cong. 51 (1984).

137. James W. Semple, *The Effect of the Sarbanes-Oxley Act on the Attorney-Client Privilege*, 53 FDCC QUARTERLY 419, 432 (2003).

138. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in sections of 15 U.S.C.A. § 7201 (West 2007)).

139. See 17 C.F.R. § 205.1 (2006).

cases.¹⁴⁰ The Act also sets out a criminal provision for retaliation or any harmful action, including interference with lawful employment or livelihood, against any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.¹⁴¹

D. Federal Sentencing Guidelines

A provision added to the Federal Sentencing Guidelines in 2004 addressed waiver of the privilege. Section 8 C 2.5(g)(1) allowed for a five-point reduction in a corporation's culpability score if the defendant fully cooperated in the investigation.¹⁴² The final sentence of § 8 C 2.5(g)(1) as of 2004 previously read: "Waiver of attorney-client privilege and work product protection is not a prerequisite to reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."¹⁴³ Under pressure from many sources, including the American Bar Association, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, and others, the amendment was removed in April 2006.¹⁴⁴

V. LEGAL PRECEDENT FACED BY QWEST

A. Tenth Circuit

At the time Qwest faced investigation by the DOJ and the SEC, there was no Tenth Circuit precedent in support of selective waiver. Tenth Circuit precedent followed the traditional rule of waiver upon disclosure. For example, *United States v. Bernard*¹⁴⁵ was a criminal proceeding wherein the defendant had disclosed attorney advice to a third party.¹⁴⁶ The court held any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege.¹⁴⁷ In 1990, in *United States v. Ryans*,¹⁴⁸ the Tenth Circuit reiterated that any voluntary disclosure by the client to a third party waives the privilege.¹⁴⁹

140. 18 U.S.C. § 1514A (Supp. 2005).

141. 18 U.S.C. § 1513(b) (Supp. 2005).

142. *Vote by U.S. Sentencing Commission May Staunch Erosion of Attorney-Client Privilege*, 90 ANTITRUST & TRADE REG. 418, 419 (2006).

143. *Id.*

144. *Change to Evidence Rule Would Allow Partial Waiver to Government Agencies*, 22 LAW. MAN. PROF. CONDUCT 319 (2006).

145. 877 F.2d 1463 (10th Cir 1989).

146. *Bernard*, 877 F.2d at 1465.

147. *Id.* (citing *United States v. Suarez*, 820 F.2d 1158 (11th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987)).

148. 903 F.2d 731 (10th Cir. 1990).

149. *Ryans*, 903 F.2d at 741 n.13.

Likewise, as to work product protection, Tenth Circuit precedent held that production of work-product material to a non-adversary waives the work product protection.¹⁵⁰

B. Other Circuits

Limited waiver of attorney-client privilege was first recognized by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.¹⁵¹ Diversified Industries was under investigation by the SEC.¹⁵² The Board of Directors hired a law firm to conduct an investigation into the Company's business practices when it was revealed that the Company may have maintained a slush fund that was used to bribe purchasing agents.¹⁵³ The law firm undertook an investigation and reported the results to the Company's Board in a memorandum that summarized employee interviews, analyzed accounting data, evaluated the conduct of certain employees, drew conclusions as to the propriety of their conduct and made recommendations as to steps the company could take.¹⁵⁴ In its initial opinion, the Eighth Circuit concluded that the law firm had not been hired to render legal advice and therefore found that the materials, which civil litigants sought in subsequent civil litigation, were not privileged.¹⁵⁵

The court also found the materials were not work product because they were not prepared in anticipation of litigation.¹⁵⁶ As such, the Eighth Circuit determined that it did not have to deal with a claim of waiver of the privilege as a result of the materials having been turned over to the government during a governmental agency investigation.¹⁵⁷ The Eighth Circuit in its initial opinion noted that the waiver issue was a serious one but need not be decided since the court had found the materials were not privileged.¹⁵⁸ The court went on to note:

[W]e would be reluctant to hold that voluntary surrender of privileged material to a governmental agency in obedience to an agency subpoena constitutes a waiver of the privilege for all purposes, including its use in subsequent private litigation in which the material is sought to be used against the party which yielded it to the agency.¹⁵⁹

150. See *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006); *Foster v. Hill*, 188 F.3d 1259, 1272 (10th Cir. 1999).

151. 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

152. *Diversified Indus.*, 572 F.2d at 611.

153. *Id.* at 607.

154. *Id.* at 607-08.

155. *Id.* at 606.

156. *Id.*

157. *Id.* at 604.

158. *Id.*

159. *Id.* at 604 n.1.

The Eighth Circuit reconsidered its opinion in *en banc*.¹⁶⁰ As to attorney-client privilege, the court found upon reconsideration, that the memoranda prepared by counsel, corporate minutes and a letter that revealed the content of the memoranda prepared by counsel were indeed privileged and that the privilege had not been waived when Diversified turned its memorandum over to a governmental agency.¹⁶¹ The court stated:

As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privileged occurred. *Bucks County Bank and Trust Co. v. Storek*, 297 F. Supp. 1122 (D. Haw. 1969), *United States v. Goodman*, 289 F.2d 256 (4th Cir.), *vacated on other grounds*, 368 U.S. 14 (1961). To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.¹⁶²

The cases relied upon by the Eighth Circuit in its *en banc* opinion are not directly on point as to waiver.¹⁶³ *Bucks County Bank & Trust Co. v. Storek*,¹⁶⁴ involved testimony given in a suppression hearing not being admissible at a subsequent criminal trial.¹⁶⁵ *United States v. Goodman*¹⁶⁶ dealt with the Fifth Amendment privilege against self-incrimination in a subsequent criminal investigation.¹⁶⁷

As to the work-product protection sought for several non-privileged documents, the court found that they were not prepared in anticipation of litigation and, therefore, were not protected.¹⁶⁸

Four years later the Circuit Court of Appeals for the District of Columbia considered a limited waiver issue in *The Permian Corp. v. United States*.¹⁶⁹ In *Permian*, Occidental Petroleum Corporation and its subsidiary, the Permian Corporation, were involved in litigation with respect to Occidental's proposed exchange offer for shares of Mead Corporation.¹⁷⁰ Millions of documents were produced and Occidental and Mead had an

160. *Id.* at 606.

161. *Id.* at 611.

162. *Id.*

163. Diversified was dealing with selective waiver which is to waive the privilege as to some parties and not others. Courts distinguish this from partial disclosure which is to waive as to some documents but not all. See *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991).

164. 297 F. Supp. 1122 (D. Haw. 1969).

165. *Buck County Bank & Trust Co.*, 297 F. Supp. at 1123.

166. 289 F.2d 256 (4th Cir. 1961), *vacated on other grounds*, 368 U.S. 14 (1961).

167. *Goodman*, 289 F.2d at 257.

168. See *id.* at 262.

169. 665 F.2d 1214 (D.C. Cir. 1981).

170. *Permian Corp.*, 665 F.2d at 1215.

agreement that there would not be an inadvertent waiver if a privileged document was inadvertently produced.¹⁷¹

Meanwhile, Occidental was involved with the SEC trying to get approval of its registration statement.¹⁷² As part of that process, Occidental agreed that the SEC could have documents that had been produced to Mead.¹⁷³ Once again, there were agreements that the documents may contain privileged information and they would not be delivered to any persons other than the SEC or SEC staff, but the agreements appeared to grant the SEC the right to turn the documents over to other governmental agencies after notice to Occidental.¹⁷⁴ Even though the letters were not explicit about the SEC being forbidden to release the information to other governmental agencies, counsel for Occidental had indicated that there was such an oral understanding.¹⁷⁵ Seven of the documents produced were attorney-client privilege and twenty-nine were protected as work product.¹⁷⁶

Thereafter, the Department of Energy sought to get the same documents that the SEC had received, including the seven documents that were protected by attorney-client privilege and twenty-nine that were protected as attorney work product.¹⁷⁷ While there seemed to be some disagreement over what exactly was Occidental's arrangement with the SEC regarding their use of the documents, the court's analysis was that there was no dispute that the documents had indeed been turned over for the SEC's use.¹⁷⁸ The Circuit found that the mantle of confidentiality had been breached and an effective waiver of the privilege had been accomplished.¹⁷⁹

As to attorney-client privilege, the D.C. Circuit declined to adopt the *Diversified* selective waiver, finding that the limited waiver would not serve the interests underlying common law privilege for confidential communications between an attorney and a client, stating "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."¹⁸⁰

171. *Id.* at 1215-16.

172. *Id.* at 1216.

173. *Id.*

174. *See id.*

175. *Id.* at 1217.

176. *Id.*

177. *Id.*

178. *See id.* at 1217-18.

179. *Id.* at 1220. As with the *Qwest* case, there was no question of inadvertent disclosure since Occidental had authorized disclosure by Mead to the SEC. *See id.* at 1219.

180. *Id.* at 1221.

Because the corporation had turned the documents over to the SEC but was resisting disclosure to the Department of Energy, the court took the opportunity to state that it was unaware of any congressional directive or judicially-recognized priority system that places a higher value on cooperation with the SEC than cooperation with other regulatory agencies stating:

Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.¹⁸¹

As to work product, with little analysis the court upheld the district court's finding of no waiver with respect to the work-product documents. The court, citing *United States v. AT&T*, noted a more liberal standard applicable to waiver of the work-product doctrine as opposed to the strict standard of waiver for attorney-client privilege:

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege.

By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege. We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.¹⁸²

In *In re Subpoena Duces Tecum* the Circuit Court for the District of Columbia again rejected selective waiver, regardless of whether there were confidentiality agreements in place with the government agency.¹⁸³

181. *Id.*

182. *Id.* at 1219 (citing *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)) (emphasis and footnotes omitted). See generally WIGMORE ON EVIDENCE, *supra* note 20, § 2327; EDWARD W. CLEARY ET AL., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 93 (2d ed. 1972).

183. *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984).

The following year the Second Circuit joined the D.C. Circuit.¹⁸⁴ In *In re John Doe Corp.*, the company was under investigation for, amongst other things, bribing governmental officials.¹⁸⁵ The privileged document, an investigatory memorandum titled Business Ethics Review ("BER"), had not been shown to a governmental agency but instead to underwriter's counsel to assure the underwriter's counsel there were no merits to claims of illegal bribes, ostensibly because there was no mention of an illegal bribe of a governmental official in the BER.¹⁸⁶ It was this silence that the Second Circuit considered a waiver once the BER was shown to underwriter's counsel.¹⁸⁷ The company argued for a selective waiver due to "the legal duty of due diligence and the millions of dollars riding on the public offering of registered securities."¹⁸⁸ The Second Circuit was unmoved:

We view this argument with no sympathy whatsoever. A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes.¹⁸⁹

The next circuit to address selective waiver was the Fourth Circuit.¹⁹⁰ The Fourth Circuit had previously refused to embrace the concept of selective waiver created in *Diversified*.¹⁹¹ As to attorney-client privilege, the court in *Martin Marietta* said, "[I]f a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as the details underlying the data . . . will not enjoy the privilege."¹⁹² In *Martin Marietta*, the court was really addressing the issue of subject matter waiver rather than selective waiver. *Martin Marietta* sought to limit the waiver to documents actually disclosed to the government rather than implying waiver to all materials on the same subject as those provided to the government.¹⁹³ But the court found there was waiver as to the entire subject.¹⁹⁴

As for work product, the court noted a broader protection for work product, but held that a waiver as to some work product will waive the

184. *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982).

185. *Id.* at 484.

186. *Id.* at 485.

187. *Id.* at 489.

188. *Id.*

189. *Id.* (noting that use of the fact of an investigation to allay the concerns of third parties about possible criminal acts, to create the appearance of compliance with laws requiring disclosure, or to cover up a crime disclosed through protected communication in the course of the investigation will cause the corporation to lose the privilege).

190. *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988).

191. See *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984); *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979).

192. *Martin Marietta Corp.*, 856 F.2d at 623 (citing *(Under Seal)*, 748 F.2d at 875).

193. *Id.*

194. *Id.*

entire subject matter.¹⁹⁵ The court also held that there was subject matter waiver of non-opinion work product but not of opinion work product,¹⁹⁶ deciding an issue it had previously left open in *Duplar Corp. v. Deering Milliken*.¹⁹⁷

The next circuit to deal with the selective waiver issue was the Third Circuit in *Westinghouse Electric Corp. v. The Republic of the Philippines*.¹⁹⁸ Westinghouse had disclosed documents relating to an internal investigation regarding possible bribes of foreign officials.¹⁹⁹ The documents had been turned over to the SEC during an SEC investigation.²⁰⁰ When the Republic of the Philippines later sued Westinghouse, alleging it had obtained a government contract in the Philippines through bribes, the civil litigants sought all the documents that had been turned over to the SEC.²⁰¹ The Third Circuit found that Westinghouse had waived both the attorney-client privilege and the work-product protection.²⁰² Westinghouse had turned over several reports generated during investigations by the SEC and the DOJ.²⁰³ The court found that this turnover effectuated a complete waiver of the attorney-client privilege as to subsequent civil litigation.²⁰⁴

The court found that selective waiver does not have anything to do with the purposes underlying the attorney-client privilege, which is to protect the confidentiality of attorney-client communications in order to encourage clients to obtain informed legal assistance.²⁰⁵ The court reviewed the only known exceptions to waiver despite a disclosure: (1) for co-defendants or (2) disclosure to an agent necessary to obtain informed advice and found that each of these continued to promote the purposes behind the privilege.²⁰⁶ The Third Circuit found that a selective waiver, designed to encourage corporations to undertake internal investigations, does not serve any purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance.²⁰⁷

In fact, the Third Circuit opined that a whole new privilege was being sought and was not persuaded that a new privilege was necessary to encourage corporations to cooperate with the government.²⁰⁸ The court noted that no such privilege had been created as of the time corporations,

195. *Id.* at 624-25.

196. *Id.* at 625-26.

197. 540 F.2d 1215, 1222-23 (4th Cir. 1976); see FED. R. CIV. P. 26(b)(3).

198. 951 F.2d 1414 (3d Cir. 1991).

199. *Westinghouse Elec. Corp.*, 951 F.2d at 1417.

200. *Id.*

201. *Id.*

202. *Id.* at 1418.

203. *Id.* at 1417.

204. *Id.* at 1418.

205. *Id.* at 1424.

206. *Id.*; see also *supra* note 46.

207. *Westinghouse Elec. Corp.*, 951 F.2d at 1425.

208. *Id.*

like Westinghouse, were cooperating with the government in its various agency investigations.²⁰⁹

Likewise, the Third Circuit found that Westinghouse waived the work-product protection for work-product documents by turning them over to the SEC and the DOJ.²¹⁰ The court held:

When a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine.²¹¹

The next circuit to address selective waiver was the Second Circuit in *In re Steinhardt Partners*.²¹² *Steinhardt Partners* addressed only waiver of work-product documents. In *Steinhardt Partners*, the company was alleged to have manipulated the market for two-year treasury notes.²¹³ In civil litigation relating to this same conduct, the company withheld a memorandum prepared by its attorneys and previously given to the SEC.²¹⁴ The memorandum had been solicited by the SEC during the investigation of the company and while there was a pending threat of an enforcement action.²¹⁵ There was no agreement that the SEC would maintain confidentiality of the memorandum.

The Second Circuit rejected Steinhardt's attempt to use the work-product protection to sustain this unilateral use of a work-product memorandum containing counsel's legal theories which had been voluntarily submitted to an investigatory body.²¹⁶ The court stated, "[W]e agree that selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."²¹⁷ The court said the same rationale used for attorney-client privilege and work-product cases on selective privilege applied, citing *Permian* and *Westinghouse*.²¹⁸

But in rejecting Steinhardt's plea for selective waiver in this case, the Second Circuit declined to adopt a per se rule and held that "[c]rafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis."²¹⁹ The court implied that

209. *Id.*

210. *Id.* at 1429.

211. *Id.*

212. 9 F.3d 230 (2d Cir. 1993).

213. *Steinhardt Partners*, 9 F.3d at 232.

214. *Id.*

215. *Id.*

216. *Id.* at 234.

217. *Id.* at 235.

218. *Id.*; *Permian Corp.*, 665 F.2d at 1221; *Westinghouse Elec. Corp.*, 951 F.2d at 1428.

219. *Steinhardt Partners*, 9 F.3d at 236.

if a written agreement had been in place, that would have been a consideration.²²⁰

Four years later, the First Circuit rejected any selective waiver in *United States v. Massachusetts Institute of Technology*.²²¹ Pursuant to contract between MIT and the Department of Defense, MIT had submitted certain billing statements to the defense contract audit agency.²²² In a subsequent IRS investigation as to MIT's tax-exempt status, the IRS sought the same documents.²²³ MIT initially redacted the documents for attorney-client privilege and work-product material.²²⁴ The IRS then sought to get the redacted information from the defense contract audit agency.²²⁵ The IRS went to the district court to enforce its subpoena, and the district court held that the disclosure of the legal bills to the audit agency forfeited the attorney-client privilege.²²⁶ Rejecting various arguments, including an argument that MIT had to make these kinds of disclosures in order to become a government defense contractor, the First Circuit held, "[A]nyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage."²²⁷

As to a work-product privilege, however, the First Circuit followed prior case law and held that the work-product protection is not as easily waived as the attorney-client privilege.²²⁸ The court found that disclosure to the audit agency was disclosure to a potential adversary because there was a potential for controversy and even a potential for litigation.²²⁹ While undoubtedly MIT hoped to avoid that controversy, it was still disclosure to an adversary.²³⁰

The Federal Circuit has not recognized limited waiver and refused to do so under the facts in *Genentech, Inc. v. United States International Trade Commission*.²³¹

In 2002, The Sixth Circuit rejected selective waiver in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*.²³² Privileged

220. *Id.*

221. 129 F.3d 681 (1st Cir. 1997).

222. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 683 (1st Cir. 1997).

223. *Mass. Inst. of Tech.*, 129 F.3d at 682-83.

224. *Id.* at 683.

225. *Id.*

226. *Id.*

227. *Id.* at 686.

228. *Id.* at 687 & n.6 (citing WRIGHT, MILLER & MARCUS, *supra* note 55, § 2024); *Westinghouse Elec. Corp.*, 951 F.2d at 1428-29; *Steinhardt Partners*, 9 F.3d at 234-35; *In re Subpoena Duces Tecum*, 738 F.2d at 1371-75; *Martin Marietta Corp.*, 856 F.2d at 625; *In re Chrysler Motors Corp. Overnight Eval. Program Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988)).

229. *Mass. Inst. of Tech.*, 129 F.3d at 687.

230. *Id.* at 686.

231. 122 F.3d 1409, 1417 (Fed. Cir. 1997).

232. 293 F.3d 289 (6th Cir. 2002).

documents had been provided to the DOJ and other government agencies.²³³ These documents were sought thereafter in civil litigation.²³⁴ After a thorough review of the state of the law, the court summarized the following: (1) cases where selective waiver was permissible;²³⁵ (2) cases where selective waiver was permissible in situations where government agrees to a confidentiality order;²³⁶ and (3) cases where selective waiver was rejected under any situation.²³⁷ After consideration, the Sixth Circuit rejected the concept of selective waiver, in all of its various forms.²³⁸

C. District Court Opinions

Several district courts have held that disclosure to governmental agencies does not waive the protections of the attorney-client privilege. Most notably for Qwest, the District of Colorado had adopted one of the exceptions for a waiver.

In 1993, in *M&L Business Machines, Inc.*, the district court in Colorado found a limited waiver in circumstances wherein the party makes a contemporaneous reservation or stipulation that it does not intend to waive the privilege and makes some effort to preserve the privacy of the privilege.²³⁹ The district court in *M&L Business Machines* discussed the state of the law of selective waiver of attorney-client privilege and acknowledged that the Tenth Circuit had not addressed the issue.²⁴⁰ The district court held that because the Bank of Boulder, in cooperating with the government in its investigation of M&L Business Machines, had provided privileged material but had reserved the right to assert the privilege in other proceedings, it had not waived the privilege.²⁴¹

The approach adopted by the District of Colorado came from *Teachers' Insurance and Annuity Association of America v. Shamrock Broadcasting Co.*²⁴² In that case, Shamrock had turned over documents to the SEC in response to subpoenas and had not entered into any confidentiality agreements with the SEC.²⁴³ The court held that if the documents had been turned over under a protective order, stipulation or other

233. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 292.

234. *Id.* at 293.

235. *Id.* at 295 (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc)).

236. *Jobin v. Bank of Boulder (M&L Bus. Mach., Inc.)*, 161 B.R. 689, 695-96 (Bankr. D. Colo. 1993) (citing *Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981)).

237. *Permian Corp.*, 665 F.2d at 1221, *In re John Doe Corp.*, 675 F.2d at 489; *Westinghouse Elec. Corp.*, 951 F.2d at 1426, *Steinhardt Partners*, 9 F.3d at 236.

238. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 302.

239. *M&L Bus. Mach.*, 161 B.R. at 695-96.

240. *Id.* at 696.

241. *Id.* at 696-97.

242. 521 F. Supp. 638 (S.D.N.Y. 1981).

243. *Shamrock Broad. Co.*, 521 F. Supp. at 639.

express reservation of the producing parties' claim of privilege as to the material disclosed, there would be no waiver in subsequent litigation.²⁴⁴

Notably in the districts that have not decided the selective waiver issue, the Seventh Circuit, Fifth Circuit and Ninth Circuit, there are district court opinions supporting selective waiver. In *In re Grand Jury Subpoena*, dated July 13, 1979, the district court held that a privileged report turned over as part of cooperation with the SEC and to the Internal Revenue Service, did not waive the attorney-client privilege.²⁴⁵ In Texas, a district court prevented class action discovery of documents that had been turned over to the SEC in *In re LTV Securities Litigation*.²⁴⁶

The Northern District of California has also adopted the *Teachers' Insurance* approach in *Fox v. California Sierra Financial Services*.²⁴⁷

D. Congressional Actions

1. Proposed Rule 502

On May 15, 2006, the Advisory Committee on Evidence Rules submitted to the Standing Committee on Rules of Practice and Procedure proposed Federal Rule of Evidence 502.²⁴⁸ The Rule addresses a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. The proposed Rule 502 addresses the scope of the waiver, inadvertent disclosure, selective waiver, controlling effect of court orders, controlling effect of party agreements, and a definition of attorney-client privilege and work product as used in the Rule. With respect to selective waiver, however, the standing Committee unanimously agreed that a provision on selective waiver should be included in any proposed rule released for public comment but should be placed in brackets to indicate that the Committee has not yet determined whether a provision on selective waiver should be sent to Congress.²⁴⁹ The standing Committee recognized that any rule prepared by the Advisory Committee should proceed through the rule-making process, but it would have to eventually be enacted directly by Congress as it would be a rule affecting privileges.²⁵⁰ The proposed Rule 502, which the standing Committee has not yet determined to send to Congress with respect to selective waiver would provide:

244. *Id.* at 646.

245. *In re Grand Jury Subpoena*, 478 F. Supp. 368, 373 (D. Wis. 1979).

246. *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981).

247. *Fox v. Cal. Sierra Fin. Servs.*, 120 F.R.D. 520, 526 (N.D. Cal. 1988).

248. Memorandum from Honorable Jerry E. Smith, Chairman of the Advisory Comm. on Evidence Rules, to Honorable David F. Levi, Chairman of the Standing Comm. on Rules of Practice and Procedure 1 (May 15, 2006) [hereinafter Memorandum from Honorable Jerry E. Smith], available at http://www.uscourts.gov/rules/reports/Excerpt_EV_Report_Pub.pdf

249. *Id.* at 3.

250. *Id.* at 9; see also 28 U.S.C.A. § 2074(b) (West 2006).

[(c) **Selective Waiver.** — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]²⁵¹

2. Proposed Legislation

On the last day of the 109th Congress, Second Session, Senator Arlen Specter introduced a bill titled the “Attorney-Client Privilege Protection Act of 2006.”²⁵² If enacted, the Act would prohibit consideration of waiver of privilege; prohibit conditioning treatment on waiver; protect corporations paying attorneys fees of individuals, joint defense agreements and sharing information with employees.²⁵³

VI. THE TENTH CIRCUIT’S OPINION

The *Qwest* case involved issues of waiver of attorney-client privilege and non-opinion work-product documents.²⁵⁴ Like the Second Circuit in *Steinhardt Partners* and several other courts that have addressed selective waiver, the Tenth Circuit did not adopt a per se rule against selective waiver.²⁵⁵

The Tenth Circuit, placing heavy emphasis on the state of the record before it, declined to expand the testimonial exclusionary rules of attorney-client privilege or work-product doctrine.²⁵⁶ After discussing the facts and analyzing the law as discussed above, the court’s conclusion

251. Memorandum from Honorable Jerry E. Smith, *supra* note 248, at 5-6. The proposed Rule 502 was sent out for public comment in August 2006. Notice from David F. Levi, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, To The Bench, Bar and Public 1 (2006), available at http://www.uscourts.gov/rules/Memo_Bench_Bar_and_Public_2006.pdf. The process for consideration and promulgation of the Rule if enacted will likely take several years. See JAMES C. DUFF, THE FEDERAL RULES OF PRACTICE AND PROCEDURE ADMIN. OFFICE OF THE U.S. COURTS, The Rulemaking Process: A Summary for The Bench and The Bar (Apr. 2006), available at <http://www.uscourts.gov/rules/proceduresum.htm>.

252. S. 30, 109th Cong. (2d Sess. 2006), available at <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>.

253. *Id.*

254. *In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179, 1181 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (U.S. Nov. 13, 2006) 1.

255. See *Steinhardt Partners*, 9 F.3d at 230; *Delwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997) (addressing law enforcement investigatory privilege but applying the same analysis); *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982); *Subpoena Duces Tecum*, 738 F.2d at 1371-72.

256. *Qwest*, 450 F.3d at 1195.

under the heading “No Selective Waiver in This Case” states, “For the reasons discussed above, the record in this case does not justify adoption of selective waiver.”²⁵⁷ The court made a reference to a deficient record on at least ten occasions:

- We conclude the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.²⁵⁸
- The record does not establish a need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege and work-product doctrine, or to avoid unfairness to the disclosing party.²⁵⁹
- On this record “[W]e are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.”²⁶⁰
- The record before us, however, does not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine. Most telling is Qwest’s disclosure of 220,000 pages of protected materials knowing the Securities Case was pending, in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances, and despite the absence of Tenth Circuit precedent.²⁶¹
- The record is equally deficient concerning whether the DOJ and the SEC may have independently gained access to the Waiver Documents by invoking other means or theories, such as the crime or fraud exception to the attorney-client privilege.²⁶²
- The record does not support reliance on the Qwest agreements with the SEC and the DOJ to justify selective waiver. The agreements do little to restrict the agencies’ use of the materials they received from Qwest.²⁶³
- The record does not indicate whether Qwest negotiated or could have negotiated for more protection for the Waiver Documents, or whether, as it asserted at oral argument, seeking further restrictions would have so diluted its cooperation to render it valueless.²⁶⁴
- The concession highlights a further record deficiency: the nature and severity of the burden placed upon the district court to sort through all 220,000 pages of Waiver Documents to determine what

257. *Id.* at 1201.

258. *Id.* at 1192.

259. *Id.*

260. *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972)).

261. *Id.* at 1193.

262. *Id.*

263. *Id.* at 1194.

264. *Id.*

use the government made of each document, and whether any further disclosure had vitiated an otherwise applicable privilege or protection.²⁶⁵

- The record in this case does not indicate that the proposed exception would promote the purposes of the attorney-client privilege or work product doctrine.²⁶⁶
- As discussed above, the record is silent on whether selective waiver truly is necessary to achieve cooperation.²⁶⁷

Some of the circuit courts that have declined to follow *Diversified* have noted that, in doing so, they are not adopting a per se rule.²⁶⁸ The Tenth Circuit also falls into this category. In doing so, the courts are preserving the ability to craft rules relating to privilege on a case-by-case basis as recognized in Federal Rules of Evidence 501 ("FRE 501") and the Supreme Court in *Upjohn*.²⁶⁹ FRE 501 was substituted by Congress for a proposed set of privilege rules drafted by The Judicial Conference Advisory Committee on Rules of Evidence and approved by The Judicial Conference of The United States and by the Supreme Court.²⁷⁰ Avoiding any per se rule is consistent with FRE 501 and the Advisory Committee Notes, which state that the rule "reflect[s] the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case by case basis."²⁷¹ FRE 501 manifests a desire to provide the courts with flexibility to develop rules of privilege on a case-by-case basis.²⁷²

The Tenth Circuit, while acknowledging its power under FRE 501, made it clear that, under the facts of the case, it saw no compelling reason to adopt a selective waiver rule on privilege.²⁷³ Granted, Qwest had entered into written confidentiality agreements with the government agencies.²⁷⁴ The First, Second, Seventh and District of Columbia Circuits have, in declining to adopt a per se rule, indicated a written confidentiality agreement may have been considered in allowing some selective waiver under certain circumstances. But, each of those courts de-

265. *Id.*

266. *Id.* at 1195.

267. *Id.* at 1196.

268. *See, e.g., Steinhardt Partners*, 9 F.3d at 236.

269. *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981); *Trammel v. United States*, 445 U.S. 40, 46 (1980).

270. *Trammel*, 445 U.S. at 46.

271. *Qwest*, 450 F.3d at 1184 (citing *Trammel*, 445 U.S. at 50).

272. *Id.*

273. *Id.* at 1192.

274. *Id.* at 1181.

clined any selective waiver of attorney-client privilege or work product under their particular case.²⁷⁵

Likewise, the Tenth Circuit found the circumstances in *Qwest* merited no allowance of selective waiver. It appeared to be the breadth of the disclosure; the excessive use of the documents in other state criminal proceedings and agency actions; the knowledge of existing civil suits at the time of disclosure; the lack of any of solid precedence, all of which persuaded the Tenth Circuit, on this record, to decline to adopt selective waiver.²⁷⁶ The Tenth Circuit also noted that, if selective waiver was essential to government operations, the agencies should have supported *Qwest*'s request; however, they did not.²⁷⁷

VII. SELECTIVE WAIVER GOING FORWARD

Although the Sixth Circuit characterized the state of the law of limited waiver as a state of "hopeless confusion,"²⁷⁸ the reality is that no corporation in the past two decades could have turned over privileged documents or work product documents to the DOJ, SEC or any other "adversary" agency without knowing that said decision may indeed result in a full waiver of the privilege, including to civil litigants.

The Sixth Circuit carefully segregated the law of selective waiver into cases in which selective waiver is allowed—(the Eighth Circuit stands alone); selective waiver is never allowed; and selective waiver might be allowed.²⁷⁹ But in reality, with the exception of the Eighth Circuit, each of the circuit courts refused to allow selective waiver under the facts presented in each case. The various circuit courts' passing references to the possibility of some factual situation in the future wherein privileged documents are turned over but no full waiver is found, is more an adherence to FRE 501 than a state of hopeless confusion of the law of selective waiver. FRE 501 leaves interpretation of privilege up to the courts, applying common law.

Notwithstanding lack of any supportive precedence, as the above-discussed case law demonstrates, many corporations chose to make the decision to turn over privileged materials to government agencies. Under the current state of the law, that decision must involve careful consideration, weighing the merits of handing over privileged documents to the government, either because they demonstrated that the company was not guilty of wrongdoing or because the corporation determines that get-

275. *In re The Leslie Fay Companies Inc. Sec. Lit.*, 161 F.R.D. 274, 284 (S.D.N.Y. 1995); *Dellwood Farms*, 128 F.3d at 1127; *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995); *Steinhardt Partners*, 9 F.3d at 236; *In re Sealed Case*, 676 F.2d at 824.

276. *Qwest*, 450 F.3d at 1193-94.

277. *Id.* at 1193.

278. *In re Columbia HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 2945 (6th Cir. 2002).

279. *Id.* at 295-302.

ting leniency from the government is important enough that the corporation would risk waiving the privilege and deal with the consequences of waiver in subsequent civil litigation. That decision-making process is a process worth preserving. As discussed above, a new proposed Rule 502 has been drafted and circulated by the Committee on Rules of Practice and Procedure.²⁸⁰ So, the question is why do we need a new rule; what will the rule really add?

The rule will make the corporation's consideration and decision easier. A corporation would be able to waive the privilege and not risk having those documents disclosed in subsequent civil litigation. But what does this really do for the attorney-client privilege? The attorney-client privilege is the "bastion of ordered liberty."²⁸¹ Its purpose is not to facilitate government investigations, but rather to encourage full and frank discussions between an attorney and his or her client to get to the truth so that the lawyer can best represent the client. It has been suggested that half of a privilege is not worth having at all.²⁸² And, indeed, it is appropriate that there be some concern over whether the proposed Rule 502 will have an adverse impact on the attorney-client privilege when a corporation tries to gather facts in an internal investigation.

Indeed, when Deputy Attorney General Paul J. McNulty made remarks at the Lawyers for Civil Justice Membership Conference on December 12, 2006, he acknowledged that there must be integrity in what a company does when investigating misconduct and that to do the job right: "[C]orporate attorneys have told me that they need full and frank communication between attorney and employee if they are expected to steer conduct away from law breaking or uncover criminal wrongdoing."²⁸³

When an individual discusses the internal affairs of a corporation with inside counsel, the hope is that they will always be frank and candid. But United States Attorney James B. Comey candidly revealed that turnover of privileged internal investigations of a corporation may be the only way that the government can get statements of individuals due to the Fifth Amendment.²⁸⁴ From employees' point of view, they may be more willing to discuss matters candidly when they are armed with the knowledge that a corporation will have to carefully consider all of the consequences of waiving the privilege, including the possibility the privilege is waived in full.

280. See *supra* note 248.

281. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE* 1, 2 (4th ed. 2001).

282. Collin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is Half-Privilege Worth Having at All*, 30 SEATTLE U. L. REV. 155, 156 (2006).

283. McNulty Memorandum, *supra* note 117.

284. Interview with U.S. Att. James B. Comey, U.S. ATT'YS BULL., November 2003, at 4.

Despite radical changes in Section VII of the McNulty Memorandum, it is not likely to have much impact on corporations' waiver of privilege. This is so because although the fact that the McNulty Memorandum expressly states that prosecutors must not use a corporation's declination against the corporation in making charging decisions, it nonetheless provides that "prosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation."²⁸⁵ Most corporations waive the privilege in hopes of getting favorable treatment. For similar reasons, the proposed Rule 502, while it may indeed facilitate corporations' cooperation in government investigations, is not likely to have a favorable impact on the attorney-client privilege itself.

With proposed Rule 502, corporations could certainly undertake the kind of analysis discussed above. Or, corporations could choose to turn over privilege documents to plead for leniency, knowing there will be fewer consequences in later civil litigation. This could have an impact on the individuals whose statements helped the corporation get favorable consideration, at their personal expense. In the long-run, this may have an adverse impact on the privilege because individuals will stop communicating.

If a corporation has to weigh the risks of waiving the privilege to the government in full, meaning accepting all the consequences including that the information may be available in civil litigation, this simply makes the decision to waive the privilege more calculated. Knowing that the corporation can waive the privilege without having to consider the consequences of that waiver in other arenas, such as civil litigation, could make employees uneasy about discussing matters with their in-house counsel. Employees do not want to become the chip the corporation uses with the government. Proposed Rule 502 undermines the gravity of a corporation's decision to waive the privilege. That decision should never be made lightly given the importance of the privilege in common law.

While the Rules Committee has not determined whether to submit proposed Rule 502(c) to Congress, such a Congressional change to the privilege is what Andrew McNally argues for in his article *Revitalizing Selective Waiver*.²⁸⁶ Mr. McNally appropriately points out that selective waiver encourages corporate cooperation with government investigations,²⁸⁷ which is indeed a laudable goal. But he candidly admits there is no case for arguing that selective waiver will further the goals and pur-

285. McNulty Memorandum, *supra* note 117, § 2.

286. *See generally* McNally, *supra* note 8.

287. *See id.* at 826.

poses of the attorney-client privilege itself.²⁸⁸ Nothing has prevented corporations from waiving the privilege, after weighing all of the consequences, in each of the cases discussed above. No doubt, even without a rule, selective waiver and government disclosures are likely to continue.

But, no doubt some corporations have refused to waive the privilege despite pressure from the government after considering the consequences and possible disclosure of that information in subsequent civil litigation. In *Stein*, the district court found that the Thompson Memorandum, as invoked by the United States Attorney's Office, caused KPMG to consider departing from its longstanding policy of paying legal fees and expenses of its personnel.²⁸⁹ KPMG was extremely anxious to curry favor with the USAO by demonstrating how cooperative it could be.²⁹⁰

At the time, the Thompson Memorandum expressly identified willingness to waive the privilege as a factor to be considered in whether a corporation is being cooperative. The McNulty Memorandum does not change this, but does say a corporation cannot be penalized for not waiving the privilege. With a new selective disclosure rule approved by Congress, corporations will be hard pressed to justify their refusal to waive the privilege to the government. And, for this reason alone, it seems that the proposed rule undermines the privilege. The government may consider it a right once a corporation does not have to consider the consequences of further disclosure to third parties, for example in civil litigation.

The privilege is too important a bastion of the common law and too critical to an attorney's ability to represent his or her client to risk undermining it with a rule that is unnecessary given the last two decades wherein hundreds of corporations have waived the privilege and participated in voluntary cooperation with government agencies.

288. See *id.* at 857.

289. *United States v. Stein*, 435 F. Supp. 2d 330, 352 (S.D.N.Y. 2006).

290. *Stein*, 435 F. Supp. 2d at 353.

IN RE QWEST COMMUNICATIONS INTERNATIONAL: DOES SELECTIVE WAIVER EXIST FOR MATERIALS DISCLOSED DURING A GOVERNMENT INVESTIGATION?

“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”¹

INTRODUCTION

In the wake of corporate wrongdoing, regulators, legislatures, and the public have demanded greater transparency of corporate transactions through government investigations. In conjunction with these investigations, corporations are encouraged to cooperate with government agencies, including, but not limited to the Department of Justice (“DOJ”)² and the Securities and Exchange Commission (“SEC”),³ by releasing privileged and protected documents. Cooperation may include the decision to waive the attorney-client privilege or work-product protection for information produced to the DOJ and SEC.⁴ It may also include a decision to sign a confidentiality agreement protecting the selectively disclosed documents from further disclosure to adversarial third parties.⁵

1. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (describing the attorney-client privilege).

2. See Memorandum from Larry D. Thompson, former Deputy Attorney General, U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (setting forth factors that federal prosecutors should weigh in determining whether to bring criminal charges against a corporation). On December 12, 2006, the DOJ released the McNulty Memorandum to replace the Thompson Memorandum, in response to the growing concern that the Thompson Memorandum was having an adverse effect on the attorney-client privilege. The McNulty Memorandum is a significant step forward in protecting attorney-client privilege, but does not go far enough to restore the balance between federal prosecutors and corporations under investigation. See Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep’t of Justice to of Dep’t Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

3. Report of Investigation Pursuant to Section 21(A) of the Securities and Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34,449,69, Accounting and Auditing Enforcement Act Release No. AE-1470, 76 SEC Docket 220 (Oct. 23, 2001) [hereinafter Seaboard Report] (setting forth criteria the SEC will employ in determining whether it should give credit for cooperation during investigation).

4. Michael H. Dore, *A Matter of Fairness: The Need For a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 761 (2006). Under the McNulty Memorandum, prosecutors may request a waiver in furtherance of their law enforcement obligations. McNulty Memorandum, *supra* note 2, at 8. Furthermore, before requesting a waiver, “prosecutors must obtain written authorization from the United States Attorney” who must then “consult with the Assistant Attorney General[,] before granting or denying [a waiver request].” *Id.* at 9. Declination of a waiver may be considered against the corporation if and when it is charged. *Id.* at 10.

5. See Dore, *supra* note 4, at 762.

The majority of federal circuit courts of appeals, including the First, Second, Third, Fourth, Sixth, Seventh, Federal, and D.C. Circuit find that disclosure of materials during a government investigation waives the attorney-client privilege and work-product doctrine.⁶ The Eight Circuit and a few district courts embrace the concept of selective or limited waiver in some situations, including where a confidentiality agreement has been signed by a corporation and the government agency.⁷ However, confusion remains over the applicability of selective waiver of the attorney-client privilege and work-product doctrine during government investigations.

In *In re Qwest Communications International, Inc.*,⁸ the Tenth Circuit chose not to adopt selective waiver and instead referred to the “nature of the common law to move slowly and by accretion.”⁹ The court thought that Qwest Communications International (“Qwest”) sought an entirely new privilege, a “government-investigation privilege,” that would constitute a “leap . . . in the common law development of privileges and protections.”¹⁰ In failing to clarify the issue of selective waiver, the Tenth Circuit further muddled the waters for corporations faced with a waiver request.

Part I of this article provides a history of the attorney-client privilege, work-product doctrine, and theory of selective waiver. Part II discusses the split among the federal circuit courts over the issue of selective waiver. Part III introduces the Tenth Circuit’s decision in *In re Qwest Communications International, Inc.* Part IV analyzes the culture of waiver, confidentiality agreements, proposed Federal Rule of Evidence 502 concerning selective waiver, policy reasons for adopting selective waiver under limited circumstances, and the purported chilling effect a rule of selective waiver would have on attorney-client communications. Finally, the conclusion addresses steps for rectifying the split among the federal circuit courts.

I. BACKGROUND

The following sections briefly discuss the origins and applications of the attorney-client privilege, work-product doctrine, and selective waiver to corporations involved in government investigations.

6. *Id.* at 761 (defining selective waiver as a waiver of materials protected by the attorney-client privilege and/or work product doctrine).

7. See Kathryn Keneally and Kenneth M. Breen, *New Life for Selective Waiver*, 30 CHAMPION 42, 43 (2006).

8. *In re Qwest Commc’ns Int’l, Inc.*, 450 F.3d 1179 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006).

9. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1192.

10. *Id.*

A. Attorney-Client Privilege for Corporations

The attorney-client privilege and work-product doctrine are distinct bodies of law that serve different purposes.¹¹ The attorney-client privilege is a common law rule of evidence¹² which governs the type of evidence admitted in court.¹³ The attorney-client privilege is the oldest privilege relating to confidential communications, dating from the Sixteenth century.¹⁴ The purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."¹⁵ The attorney-client privilege covers communication between lawyer and client where the client is the holder of the privilege.¹⁶ The attorney client privilege is "construed narrowly" because it "obstructs the truth finding process."¹⁷

The attorney-client privilege has a distinct application to corporations and other business entities. Unlike the Fifth Amendment privilege against self-incrimination,¹⁸ the attorney-client privilege may be asserted by a corporation or other organization to protect documents produced during business operations.¹⁹ The United States Supreme Court recognized the effect of the attorney-client privilege on corporations in *Upjohn v. United States*.²⁰ While confusion remains over what communications made by corporations and their agents are covered by the privilege,²¹ it is essential to clarify the issue of selective waiver to "ensure voluntary corporate compliance with the law," without waiving any protective rights.²²

11. See Karen L. Valihura & Robert J. Valihura, *Attorney-Client Privilege and Work-Product Doctrine: Corporate Applications*, in BNA CORPORATE PRACTICE SERIES PORTFOLIO No. 22-3 § XIV (2000).

12. See FED. R. EVID. 501.

13. LISA G. LERMAN ET AL., *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 165 (2005).

14. 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290 (McNaughton rev. ed. 1961).

15. *Upjohn*, 449 U.S. at 389.

16. See LERMAN, *supra* note 13, at 165.

17. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1988); see *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 323 (7th Cir. 1963).

18. *United States v. White*, 322 U.S. 694, 698-99 (1944) (denying corporations protection of the Fifth Amendment privilege against self-incrimination, on the ground that the constitutional prohibition against self-incrimination protects only natural persons).

19. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 99 (4th ed. 2001); see also *United States v. Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915) (recognizing the availability of the attorney-client privilege to corporations).

20. *Upjohn*, 449 U.S. at 392 (holding that the lower courts' application of a narrowly construed attorney-client privilege "makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem [and] also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law").

21. Some courts rely on Wigmore's treatise to support the position that legally related attorney-client communications are protected. See Valihura, *supra* note 11, § VI; WIGMORE, *supra* note 14, § 2317. Other courts find that the attorney-client privilege only protects legal advice in response to information communicated by the client. Valihura, *supra* note 11, VI.; see also *Colton v. United States*, 306 F.2d 633, 639-40 (2d Cir. 1962).

22. EPSTEIN, *supra* note 19, at 102.

B. Work-Product Doctrine for Corporations

The work-product doctrine embraces many of the same concepts of the attorney-client privilege, yet is distinct from and more expansive than the attorney-client privilege.²³ The doctrine was originally discussed in the Supreme Court decision of *Hickman v. Taylor*,²⁴ reaffirmed in *United States v. Nobles*,²⁵ and codified in the Federal Rules of Civil Procedure 26(b)(3).²⁶ *Hickman* established protection for materials collected by counsel in preparation for possible litigation, absent a showing from the adversarial party of sufficient need for the materials.²⁷ Furthermore, it protects the attorney's thoughts, mental impressions, and theories, from disclosure.²⁸ Unlike the attorney-client privilege, work-product protection historically belongs to the attorney²⁹ and is not waived unless disclosure occurs to an adversary.³⁰

The work-product doctrine also applies to corporations.³¹ The majority of cases conclude that internal investigations of possible illegal activity by the corporation performed in close proximity to litigation qualify for coverage under the work-product doctrine.³²

C. Selective Waiver

Protection afforded by the attorney-client privilege and work-product doctrine is not absolute.³³ Protection is waived to privileged material if the client, client's attorney, or agent of the client agrees to waive the privilege.³⁴ Many courts find action evidencing a disregard for the confidential nature of a legal communication is enough to waive protection under the work-product doctrine and attorney-client privilege.³⁵

23. Valihura, *supra* note 11; see *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

24. 329 U.S. 495, 508 (1947).

25. 422 U.S. at 236-39.

26. FED. R. CIV. P. 26(b)(3). The Federal Rules of Criminal Procedure also include a provision codifying work-product protection for pre-trial discovery in criminal proceedings. See FED. R. CRIM. P. 16(b)(2).

27. EPSTEIN, *supra* note 19, at 480-81 (summarizing *Hickman*, 329 U.S. 495).

28. See FED. R. CIV. P. 26(b)(3).

29. Valihura, *supra* note 11.

30. *Westinghouse Elec. Corp.*, 951 F.2d at 1428; cf. *Reliance Ins. Co. v. McNally Inc.*, No: 89-2401-V, 1992 U.S. Dist. LEXIS 22605, at *9 (D. Kan. Feb. 5, 1992) (declining to find a waiver when two parties with a common legal interest share information).

31. JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE §7.06 (3d ed. 2000).

32. See *In re Int'l Sys.*, 693 F.2d 1235, 1243 (5th Cir. 1982); *In re Grand Jury Investigation* (Sun Co.), 599 F.2d 1224, 1229 (3d Cir. 1979).

33. Valihura, *supra* note 11, § VII; *Nobles*, 422 U.S. at 239.

34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78(1) (2000).

35. Valihura, *supra* note 11, § VII. See generally *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that "if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels"); *W.R. Grace & Co. v. Pullman, Inc.*, 446 F. Supp. 771, 775 (W.D. Okla. 1976) (holding that "[o]ne cannot produce documents and later assert a privilege which ceases to exist because of the production"); *In re Penn Cent. Commercial Paper Litig.*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973) (holding that "once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies").

Courts reason that if the client is indifferent to maintaining confidentiality to privileged materials, the law should not protect the privilege at the expense of other parties with an interest in the materials.³⁶

In the corporate context, the law governing selective waiver of attorney-client privilege and work-product doctrine is unsettled.³⁷ Of particular concern is the applicability of selective waiver in the context of government investigations. Some courts find that turning over privileged materials to the government does not necessarily waive the attorney-client privilege or work-product protection.³⁸ Yet others, following the strict language of the attorney-client privilege and work-product doctrine, reject the idea of selective waiver.³⁹ Courts rejecting selective waiver have reasoned that selective invocation of the privilege is an abuse of discretion.⁴⁰ Because "the privilege prevents forced disclosure" of materials to adversarial third parties, courts do not allow clients to pick and choose when to assert the protection.⁴¹

II. SELECTIVE WAIVER AMONG THE FEDERAL CIRCUIT COURTS

With the exception of the Eighth Circuit, the majority of federal circuit courts of appeals reject the selective waiver doctrine. The following sections discuss the decisions of the circuits addressing selective waiver. Section A reviews the Eighth Circuit's minority view for allowing selective waiver. Section B reviews the decisions of the majority of federal circuit courts rejecting selective waiver. Despite the common conclusion

36. See GERGACZ, *supra* note 31, §§ 5.04-5.05.

37. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002) (stating that the case law addressing selective waiver is "in a state of hopeless confusion." (citing *In re M & L Bus. Mach. Co. Inc.*, 161 B.R. 689, 696 (D. Colo. 1993))).

38. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (finding selective waivers applicable in certain circumstances); see also *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1128 (7th Cir. 1997) (finding of forfeiture where the government failed to obtain a confidentiality agreement); *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993) (stating that if the government agrees to maintain confidentiality, disclosure of documents does not constitute a waiver); *Teachers Ins. & Annuity Ass'n of Am. v. Shamrock Broad. Co.*, 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981) (holding that disclosure to the SEC constitutes a complete waiver unless privilege is specifically reserved at the time of disclosure).

39. See *Columbia/HCA*, 293 F.3d at 302; *Westinghouse Elec. Corp.*, 951 F.2d at 1425 (holding that selective waiver to the government was "laudable," but did not serve the purpose of the attorney-client privilege); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 685 (1st Cir. 1997) (holding that maintaining the attorney-client privilege "makes the law more predictable and . . . eases its administration"); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (declining to embrace the concept of limited waiver of the attorney-client privilege, the court found that when "a client communicates information to his attorney with the understanding that the information will be revealed to others, that information . . . will not enjoy the privilege." (quoting *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984))); *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981) (finding the attorney-client privilege available to a litigant who maintains "genuine confidentiality").

40. GERGACZ, *supra* note 31, § 5.05.

41. *Id.* (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (holding that the "party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party").

of the federal circuit courts that selective waiver does not afford protection to voluntarily disclosed materials, the lack of uniformity in reasoning among the circuits is of great concern.

A. Minority View: Disclosure in Certain Circumstances Does Not Constitute Waiver

Only a few courts have sanctioned or adopted a per se rule against selective waiver;⁴² this leaves the door open for use of selective waiver under certain circumstances.⁴³

The majority of arguments in favor of selective waiver gain their credence from the Eighth Circuit's decision in *Diversified Industries v. Meredith*.⁴⁴ In *Diversified*, "[t]he Weatherhead Company sought an internal [investigation] report prepared by outside counsel for Diversified's independent audit committee."⁴⁵ The resulting report was later disclosed to the SEC pursuant to subpoena.⁴⁶ Finding for *Diversified*, the court asserted that the documents disclosed to the SEC were within the scope of the attorney-client privilege and the work-product doctrine and, thus, protected from further disclosure.⁴⁷ Judge Henley held that production of the documents to the SEC constituted a limited waiver of the attorney-client privilege: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."⁴⁸

Although the Eighth Circuit continues to follow this rule, it stands alone among federal circuit courts. However, Judge Boggs, sitting in the Sixth Circuit, provided in his dissent in *In re Columbia/HCA*,⁴⁹ well-reasoned support for the theory of selective waiver.⁵⁰ Recognizing the important public policy interest of cooperating with the government, Judge Boggs stated that "[although] the harms of selective disclosure are not altogether clear, the benefits of the increased information to the gov-

42. See *infra* notes 56-88 and accompanying text.

43. See, e.g., *Diversified Indus.*, 572 F.2d at 606; *In re Steinhardt Partners*, 9 F.3d at 236; *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 689 (S.D.N.Y. 1980) (discussing voluntary disclosure of privileged material to the SEC for purposes of nonpublic informal investigation, a proceeding to which plaintiffs were not a party, did not constitute a waiver of the attorney-client privilege); *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553 2002 WL 31657622, at *7-8 (Del. Ch. 2002) (noting the many circumstances and policy reasons for allowing selective waiver); *Maruzen Co., Ltd. v. HSBC USA, Inc.*, No. 00 Civ. 1079, 2002 WL 1628782, at *1 (S.D.N.Y. 2002) (holding that voluntary disclosure to government agencies pursuant to an explicit non-waiver agreement does not waive the attorney-client privilege or work-product doctrine).

44. 572 F.2d 596.

45. See Dore, *supra* note 4, at 762; *Diversified Indus.*, 572 F.2d at 599-600.

46. *Diversified Indus.*, 572 F.2d at 599-600.

47. *Id.*

48. *Id.* at 611.

49. 293 F.3d 289 (6th Cir. 2002).

50. *Id.* at 307-14 (Boggs, J. dissenting).

ernment should prevail.”⁵¹ He characterized the court’s choice as “not one whether or not to release privileged information to private parties that has already been disclosed to the government, but rather one to create incentives that permit voluntary disclosures to the government at all.”⁵² Judge Boggs opined that other methods, such as search warrants and civil discovery, would not reach privileged materials and may consume additional government time and money.⁵³ Finally, the dissent rejected the majority claim that enforcement of the rule would be burdensome and possibly expensive, stating that the exception “seems clear and predictable,” and “as rule-like as this court makes it.”⁵⁴

B. The Majority View: Disclosure Constitutes Waiver

The majority of federal circuit courts reject selective waiver of the attorney-client privilege and work-product doctrine.⁵⁵ However, not all circuits have done so for the same reason. The following review of federal circuit court decisions are broken into three categories: 1) circuits rejecting selective waiver with a confidentiality agreement; 2) circuits rejecting selective waiver without a confidentiality agreement; and 3) circuits rejecting selective waiver based on the facts in the case, not on the theory alone.

1. Selective Waiver With a Confidentiality Agreement

In *Westinghouse Electric Corp. v. Republic of Philippines*,⁵⁶ the Philippines government alleged that Westinghouse bribed its former President to procure a contract to build the nation’s first nuclear power plant.⁵⁷ During investigations of the alleged bribe, Westinghouse disclosed an internal investigation report to the SEC⁵⁸ based on the agency’s confidentiality regulations, and subsequently to the DOJ, pursuant to a confidentiality agreement.⁵⁹ The Philippines sought discovery of this report and the underlying documents.⁶⁰ Westinghouse refused, citing the attorney-client privilege and work-product doctrine, arguing that a confi-

51. *Id.* at 311 (Boggs, J. dissenting).

52. *Id.* at 312 (Boggs, J. dissenting).

53. *Id.* at 311-12 (Boggs, J. dissenting).

54. *Id.* at 313 (Boggs, J. dissenting).

55. *See supra* note 39 and accompanying text.

56. 951 F.2d 1414.

57. *Id.* at 1417.

58. *Id.* Westinghouse relied on SEC regulations stating that “[i]nformation or documents obtained by the [SEC] in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public.” *Id.* at 1418 n.4 (citing 17 CFR § 203.2 (1978)). SEC regulations “further provided that information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized.” *Id.* (citing 17 CFR § 240.0- 4 (1978)).

59. *Id.* at 1417. The agreement between Westinghouse and the DOJ stated in part that: (1) the DOJ could review the attorney-client privileged and work product protected materials; (2) the materials would not be disclosed outside of the DOJ; and (3) that such review would not undermine work-product protection and attorney-client privileges afforded to Westinghouse. *Id.* at 1419.

60. *Id.* at 1420.

dentiality agreement specifically stated that disclosure to the DOJ did not constitute a waiver.⁶¹

The Third Circuit rejected the Eighth Circuit's approach to waiver⁶² and held that selective waiver "has little to do with" the underlying purpose of the attorney-client privilege to encourage clients to seek legal advice.⁶³ The court noted that several factors warn against creating a new privilege allowing parties to disclose materials to the government without waiving the attorney-client privilege.⁶⁴ Finally, the fact that Westinghouse and the DOJ entered into a confidentiality agreement made no difference.⁶⁵ In the court's view, voluntary disclosure to another party waives the attorney-client privilege, regardless of whether the party agrees not to disclose the communications through a confidentiality agreement or compulsion through subpoena.⁶⁶

In *In re Columbia/HCA Healthcare Corp.*,⁶⁷ the Sixth Circuit upheld a district court decision that Columbia/HCA waived protection to written reports summarizing results and findings from internal audits supplied to the DOJ in conjunction with an investigation.⁶⁸ Columbia/HCA initially asserted that the documents relating to those audits were protected by the attorney-client privilege and work-product doctrine.⁶⁹ Columbia/HCA argued that it had not waived any privilege protection over the documents by voluntarily disclosing them to the DOJ because they had entered into a confidentiality agreement with the DOJ.⁷⁰ The Sixth Circuit found that any voluntary disclosure of privileged documents to a third party operates as a complete waiver of otherwise applicable immunities from production.⁷¹

61. *Id.*

62. *Id.* at 1425. The Eighth Circuit rejected the selective waiver justification in *Diversified* because "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose." *Id.* Moreover, the court noted, "selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified*." *Id.*

63. *Id.* at 1424. The Third Circuit relied heavily on the decision in *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), that however laudable cooperation may be, selective waiver is beyond the intended purposes of the attorney-client privilege. *Id.* at 1424-25.

64. *Id.* at 1425-26 ("First, because privileges obstruct the truth-finding process, the Supreme Court has repeatedly warned the federal courts to be cautious in recognizing new privileges. In addition, the Supreme Court has been 'especially reluctant to recognize a privilege in an area where it appears that Congress has considered the competing concerns but has not provided the privilege itself . . . Congress rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency)."

65. *Id.* at 1426-27.

66. *Id.*

67. 293 F.3d 289 (6th Cir. 2002).

68. *Columbia/HCA*, 293 F.3d at 289.

69. *Id.* at 292.

70. *Id.* at 293.

71. *Id.* at 300-02.

2. Selective Waiver Without a Confidentiality Agreement

In *Permian Corp. v. United States*,⁷² the D.C. Circuit held that disclosure of documents to the SEC by a subsidiary of Permian, Occidental, waived the attorney-client privilege to the documents.⁷³ Although the district court found that documents sought by the Department of Energy in an unrelated investigation were protected by the attorney-client privilege, the D.C. Circuit found Occidental waived the privilege by disclosing the documents to the SEC.⁷⁴ The court expressly rejected the Eighth Circuit's selective waiver theory, finding the argument "wholly unpersuasive," and concluded that unfair results would occur by allowing litigants to convert "the privilege into a tool for selective disclosure."⁷⁵ The court noted that letters sent between Occidental and the SEC may have created an implicit confidentiality agreement between the two parties, but Occidental did little to protect the waiver documents once they changed hands.⁷⁶

In *In re Martin Marietta Corp.*,⁷⁷ the Fourth Circuit strictly interpreted the selective waiver doctrine in the attorney-client privilege and work-product doctrine context.⁷⁸ Faced with charges that Martin Marietta defrauded the Department of Defense and committed mail fraud, Martin Marietta, upon invitation of the U.S. Attorney, submitted a position paper to the U.S. Attorney detailing why the company should not be prosecuted.⁷⁹ The position paper was later sought by an indicted employee for use in his defense against charges arising out of the same activities.⁸⁰

The Fourth Circuit discussed the many "competing policy concerns" that have led courts to carve out exceptions to the rule of waiver.⁸¹ However, the court rejected Martin Marietta's argument for selective waiver because the indicted employee sought materials that had already been revealed to the government.⁸² The court noted the adversarial interests of the two parties involved in the litigation, that Martin Marietta made an express assurance of completeness of its disclosure to the U.S. Attorney, and that the disclosures were made in an attempt to settle on-

72. 665 F.2d 1214 (D.C. Cir. 1981).

73. *Permian Corp.*, 665 F.2d at 1219.

74. *Id.*

75. *Id.* at 1220-21. Judge Abner Mikva characterized the privilege as resting on the need for secrecy between a lawyer and his client, and that turning documents over to the SEC was inconsistent with this need for confidentiality. *Id.*

76. *Id.* at 1219-20.

77. 856 F.2d 619 (4th Cir. 1988).

78. *Martin Marietta Corp.*, 856 F.2d at 626.

79. *Id.* at 623.

80. *Id.*

81. *Id.* at 623 (Noting concerns such as "facilitating the settlement of litigation, permitting full cooperation among joint defendants, expediting discovery and encouraging voluntary disclosure to regulatory agencies").

82. *Id.* at 623-24.

going controversies.⁸³ Therefore, the position paper submitted to the U.S. Attorney was not entitled to protection.⁸⁴

In *United States v. Massachusetts Institute of Technology*,⁸⁵ the First Circuit upheld in part and vacated in part a district court decision that the Massachusetts Institute of Technology's ("MIT") disclosure of its legal bills to a government agency waived the attorney-client privilege to those materials, thus, requiring MIT to turn over the legal bills to the Internal Revenue Service ("IRS").⁸⁶ In reaching its decision, the First Circuit favored adherence to clear rules, rather than abandoning them in favor of an unstructured doctrine.⁸⁷ Moreover, the court rejected the idea that a tacit agreement between MIT and the IRS protected the privileged materials that were later disclosed, because anyone who discloses documents has an incentive to do so.⁸⁸

3. Rejection of Selective Waiver Based on Case Facts

In *In re Steinhardt Partners, L.P.*,⁸⁹ the Second Circuit held that Steinhardt Partners, subject to an SEC investigation, waived work-product protection to a memorandum by submitting it to the SEC.⁹⁰ Because Steinhardt voluntarily disclosed the memo to the SEC, an adversary, work-product protection was waived to other parties.⁹¹ Judge Tenney was unmoved by the argument that corporations would no longer cooperate with the government and would be reluctant to investigate internal wrongdoing.⁹² In the eyes of the court, there are "substantial incentives" for corporations to cooperate with the SEC.⁹³

Moreover, when a company voluntarily cooperates with a government entity, it deliberately gives up some of the benefits of the adversarial system in order to obtain the significant potential benefits of such

83. *Id.* at 625.

84. *Id.*

85. 129 F.3d 681 (1st Cir. 1997).

86. *Mass. Inst. of Tech.*, 129 F.3d at 681-84 (Finding that the privilege is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").

87. Ashok M. Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation*, 106 W. VA L. REV. 359, 373 (2004).

88. *See Mass. Inst. of Tech.*, 129 F.3d at 686 ("Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path--which has no logical terminus--and we join in this reluctance.").

89. 9 F.3d 230 (2d Cir. 1993).

90. *In re Steinhardt Partners*, 9 F.3d at 236.

91. *Id.* at 234-35.

92. *Id.* at 235-36.

93. *Id.*

cooperation.⁹⁴ The fact that the defendant, faced with a federal probe and a civil lawsuit, was forced to “make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine.”⁹⁵

The Second Circuit, however, declined to adopt a per se rule that all voluntary disclosures to the government act as a waiver of work-product protection.⁹⁶ Instead, issues of selective waiver should be applied in a common-sense manner on a “case-by-case basis.”⁹⁷

In *Genentech v. United States International Trade Commission*,⁹⁸ the Federal Circuit addressed the issue of selective waiver.⁹⁹ Genentech filed a complaint against the United States International Trade Commission (“ITC”) based on alleged violations of some of its patents.¹⁰⁰ In a concurrent lawsuit against other competitors for patent infringement, Genentech inadvertently disclosed several thousand documents.¹⁰¹ After an Indiana district court ruled that Genentech waived its privilege to the documents, Genentech’s opponents in the ITC proceedings requested disclosure of the documents.¹⁰²

The court disagreed with Genentech’s view that waiver of a privilege should be limited to proceedings in district court.¹⁰³ Genentech’s documents were not protected, the court reasoned, by the attorney-client privilege because Genentech failed to use “‘best efforts’ to maintain the confidentiality of the documents.”¹⁰⁴ Instead of allowing waiver, the court adopted a rule of general waiver that allows the documents from district courts to be introduced in later court proceedings.¹⁰⁵

Finally, the Seventh Circuit discussed the idea of selective waiver in dicta, in *Dellwood Farms, Inc. v. Cargill, Inc.*¹⁰⁶ The court explained that materials in the government’s investigative files were protected from disclosure by the law enforcement investigatory privilege.¹⁰⁷ Judge Posner delivered the opinion of the court and noted that “[i]n the case of selective disclosure, the courts feel, reasonably enough, that the possessor of the privileged information should have been more careful, as by

94. *Id.*

95. *Id.* at 236.

96. *Id.* The court was concerned that a per se rule would fail to “anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information,” or those situations where the parties “entered into an explicit agreement” that the materials would remain confidential. *Id.*

97. *Id.*

98. 122 F.3d 1409 (Fed. Cir. 1997).

99. *Genentech*, 122 F.3d at 1415-18.

100. *Id.* at 1411-12.

101. *Id.* at 1413.

102. *Id.*

103. *Id.* at 1416-17.

104. *Id.* at 1418.

105. *Id.*

106. 128 F.3d 1122, 1122 (7th Cir. 1997).

107. *Dellwood Farms*, 128 F.3d at 1124-26.

obtaining an agreement by the person to whom they made the disclosure not to spread it further.”¹⁰⁸ While the Seventh Circuit disavowed selective waiver in the cases before it, one may read this statement of the court to argue for selective waiver of the attorney-client privilege where there is a confidentiality agreement.

III. *IN RE QWEST COMMUNICATIONS INTERNATIONAL, INC.*¹⁰⁹

This section outlines the facts and circumstances that led to the Tenth Circuit’s decision in *Qwest*.

A. *Facts*

In consolidated securities class actions against defendant Qwest, lead plaintiff shareholders sought an order that Qwest turn over 220,000 pages of otherwise privileged material that it had produced to the SEC and DOJ during investigations.¹¹⁰ Prior to producing the documents, Qwest entered into confidentiality agreements with the agencies whereby Qwest stated that it did not intend to waive the attorney-client privilege or work-product protection.¹¹¹ Concurrently, a number of private plaintiffs sued Qwest alleging securities violations.¹¹² During the course of the securities case, “Qwest produced millions of pages of documents to the Plaintiffs, but did not produce the Waiver Documents.”¹¹³ The plaintiffs later sought the disclosure documents through discovery.¹¹⁴ Qwest asserted that it had only selectively waived the privilege and that waiver only applied to the government agencies, not the plaintiffs.¹¹⁵ The magistrate judge ruled that Qwest waived protection by producing the documents to the SEC and DOJ and ordered Qwest to produce the waiver documents to the plaintiffs.¹¹⁶ Qwest refused. The district court affirmed the magistrate’s decision and further required Qwest to produce certain reports prepared by its counsel.¹¹⁷

Qwest filed a motion to reconsider the order to produce the documents and to certify an interlocutory appeal, which was granted in part by the district court.¹¹⁸ However, the district court declined to certify the

108. *Id.* at 1127.

109. 450 F.3d 1179 (10th Cir. 2006).

110. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1181.

111. *Id.* The confidentiality agreements stated, in relevant part, that the protected documents would not be disclosed, except to the extent that those agencies determined that disclosure would be “required by law or . . . in furtherance of the Commission’s discharge of its duties and responsibilities.” *Id.*

112. *Id.* at 1182.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

interlocutory appeal on the waiver issue.¹¹⁹ Subsequently, Qwest filed a writ of mandamus in the Tenth Circuit on the waiver issue.¹²⁰

B. Decision

The Tenth Circuit rejected Qwest's argument that agreements with the SEC and DOJ prevented disclosure to third parties.¹²¹ The court reviewed other federal circuit court decisions addressing selective waiver and found only the Eighth Circuit had adopted the rule in "circumstances applicable to Qwest."¹²² Based on the record in the case, the court held: (1) a selective waiver rule is not necessary to ensure Qwest's cooperation with the government;¹²³ (2) the confidentiality agreement between Qwest and the SEC and DOJ granted the government agencies "broad discretion to use the Waiver Documents . . . and any restrictions on their use were loose in practice;"¹²⁴ (3) a selective waiver rule will not promote the attorney-client privilege or work product doctrine;¹²⁵ (4) refusal to adopt a selective waiver rule did not result in unfairness to Qwest;¹²⁶ (5) the case law did not support selective waiver;¹²⁷ (6) Qwest advocated a new government investigation privilege;¹²⁸ and (7) the record is silent "regarding [the] existence, significance, and longevity" of the purported "culture of waiver."¹²⁹

The court began its analysis with the attorney-client privilege and work-product doctrine, finding protection provided by both were lost if confidential information is disclosed to a third party.¹³⁰ The court reviewed cases for and against selective waiver, noting the majority of federal circuits rejecting selective waiver.¹³¹ Furthermore, the court found a waiver of protection, regardless of the existence of a confidentiality agreement covering the waiver, noting that a disclosing party uses voluntary disclosure as a means to "forestall prosecution . . . or to obtain lenient treatment."¹³²

In rejecting selective waiver, the Tenth Circuit stated that the common law moves "slowly and by accretion," thus precluding it from adopting selective waiver because such a rule "would be a leap . . . in the

119. *Id.*

120. *Id.*

121. *Id.* at 1181.

122. *Id.* at 1186.

123. *Id.* at 1193 (Qwest made the decision to disclose, notwithstanding the almost unanimous circuit-court rejection of selective waiver and the lack of Tenth Circuit precedent).

124. *Id.* at 1194.

125. *Id.* at 1195.

126. *Id.* at 1196 (explaining that allowing a party to "choose who among its opponents would be privy to the Waiver Documents is far from a universally accepted perspective of fairness").

127. *Id.* at 1196-97.

128. *Id.* at 1197-99.

129. *Id.* at 1199-1200.

130. *Id.* at 1185-86.

131. *Id.* at 1187.

132. *Id.* at 1190.

common law development of privileges and protections.”¹³³ The court characterized selective waiver as “the substantial equivalent of a new privilege.”¹³⁴ As the Supreme Court has “declined to recognize new privileges,” such a marked shift in the law should derive from the legislature, not the courts.¹³⁵ If a change is to be made, it is the province of the legislature to determine whether voluntary privileges are “so important that they deserve special treatment.”¹³⁶

The Tenth Circuit stated that the record before it did little to “support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine.”¹³⁷ Instead, Qwest voluntarily disclosed materials, notwithstanding the unanimous federal circuit court rejection and lack of Tenth Circuit precedent on the issue.¹³⁸ Although the Tenth Circuit did not find confidentiality agreements “irrelevant,” as other courts have, the court concluded Qwest’s confidentiality agreements “do not support adoption of selective waiver,” because they allow for widespread disclosure at the discretion of the SEC and DOJ.¹³⁹ Furthermore, broadening the reach of the privilege or protection might have the opposite effect of inhibiting communication between attorney and client because employees may be reluctant to fully disclose information to their employer.¹⁴⁰

Addressing the tactical nature of the waiver decision, the court noted that allowing Qwest to choose among its opponents that “would be privy to the Waiver Documents is far from a universally accepted perspective of fairness.”¹⁴¹ Instead, adopting the doctrine of selective waiver would be “another brush on an attorney’s palette, utilized and manipulated to gain tactical or strategic advantage.”¹⁴² Qwest, perceiving an obvious advantage from disclosure, “hedged its bets” that the documents would be covered by selective waiver, thus accepting the

133. *Id.* at 1192.

134. *Id.* at 1197.

135. *Id.* at 1197-99 (citing *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972)). To support its position, the Tenth Circuit pointed out that both Congress and the SEC have declined to adopt selective waiver with regard to the Securities and Exchange Act. *Id.* at 1198. Furthermore, the court argued that courts in general are not the appropriate forum for such change. *Id.* at 1199.

136. *Id.* at 1200-01 (citing *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984)); see also *McKesson HBOC, Inc. v. Super. Ct.*, 9 Cal. Rptr. 3d 812, 821 (Cal. Ct. App. 2004) (“Given the Legislature’s expressed desire to control evidentiary privileges and protections, adoption of the selective waiver theory should come from that body.”).

137. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1193.

138. *Id.*; cf. *In re M & L Business Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993) (the only Colorado district court case supporting the idea of selective waiver was rejected by the Tenth Circuit because, unlike Qwest, the bank in *M & L* took “substantial steps” to ensure confidentiality, did not disclose documents to benefit itself, and the fact that the documents did not pertain to a government investigation).

139. *In re Qwest Commc’ns Int’l*, 450 F.3d at 1194.

140. *Id.* at 1195.

141. *Id.* at 1196.

142. *Id.* at 1188 (quoting *Steinhardt Partners*, 9 F.3d at 235).

possible resulting consequences.¹⁴³ In the eyes of the Tenth Circuit, this gamble was evidence that adoption of a selective waiver rule was not necessary to preclude Qwest from being unfairly treated.¹⁴⁴

Finally, the court addressed the purported culture of waiver advanced by Qwest and supported by amici.¹⁴⁵ The court found the “anecdotal material” serving as the foundation for the purported “culture of waiver,” was silent regarding its “existence, significance, or longevity.”¹⁴⁶ Furthermore, the record was “silent about Qwest’s particular dealings with the agencies and whether it experienced the tactics deplored in amici.”¹⁴⁷ However, the court’s interest in the specific tactics employed by the agencies suggests that a well-documented record of coercion may be important for parties seeking to claim that disclosure does not result in selective waiver.¹⁴⁸

IV. ANALYSIS

The Tenth Circuit in *Qwest Communications International* passed on the opportunity to clarify much of the confusion and legitimate concern underlying selective waiver. The court left open many of the important questions and issues plaguing attorneys facing a waiver request by stating that the facts in the case counsel against allowing a waiver. To clarify the issue of selective waiver and once again give credence to the privileges and protections that lie at the very foundation of the jurisprudential system, five distinct areas must be addressed and clarified: 1) the routine practice of government officials seeking a waiver during government investigations; 2) the language of proposed Federal Rule of Evidence 502(c); 3) the validity of confidentiality agreements in conjunction with a selective waiver; 4) the policy concerns favoring a practical selective waiver rule; and 5) the purported chilling effect selective waiver will have on employee communications with corporate counsel. Clarifying these issues will provide strength to the privileges and protections of the United States legal system and further eliminate barriers to corporate cooperation with government investigations.

A. Government Practices and Proposed Federal Rule of Evidence 502(c)

This section discusses the current practice of government agencies of actively seeking waivers. While DOJ and SEC policies promote honesty and fair dealings with the government and investing public, these policies also undermine attorney-client relations. The DOJ revised its

143. *Id.* at 1196.

144. *Id.*

145. *Id.* at 1199.

146. *Id.*

147. *Id.*

148. *See id.* at 1199-2000.

corporate investigation guidelines late in 2006, but the new guidelines are a modest improvement over previous practices.¹⁴⁹ The Judicial Conference Advisory Committee on Evidence Rules ("Advisory Committee") has stepped into the controversy by proposing a new waiver rule. However, the new waiver rule does little to curb current problems and creates new challenges for attorneys.

1. Culture of Waiver: Coercive Government Waiver Tactics

A major concern facing corporations today is the "culture of waiver" established by government agencies during investigations.¹⁵⁰ Essentially, the argument is that DOJ¹⁵¹ and SEC¹⁵² practices effectively deputize corporate America as an arm of law enforcement during the course of an investigation by pressuring corporate attorneys to voluntarily disclose materials to receive cooperation credit.¹⁵³ The Tenth Circuit all but dismissed the "culture of waiver" by referring to the "anecdotal material" serving as its foundation.¹⁵⁴ While the Tenth Circuit dismissed the evidence Qwest put forth to support the existence of the culture of waiver, the evidence has caught the attention of several "prominent legal

149. See McNulty Memorandum, *supra* note 2 and accompanying text; see also Thompson Memorandum, *supra* note 2 and accompanying text.

150. See The Decline of the Attorney-Client Privilege in the Corporate Context, Survey Results Presented to U.S. Congress and U.S. Sentencing Commission by Am. Chemistry Council et al., at 3 (2006) [hereinafter Corporate Survey Results], available at <http://www.acca.com/Surveys/attyclient2.pdf>.

151. The DOJ's policy was originally outlined in the in the 1999 "Holder Memorandum." Memorandum from Eric H. Holder, Jr., Deputy Attorney General, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>. The Holder Memorandum was later refined in the 2003 "Thompson Memorandum," which encouraged federal prosecutors to request companies to waive its privileges as a condition for receiving cooperation credit during an investigation. Thompson Memorandum, *supra* note 2. The Thompson Memorandum was refined in the 2006 McNulty Memorandum, making it more difficult for the government to force companies to disclose privileged materials and communications. However, the McNulty Memorandum makes clear that prosecutors can always consider favorably decisions to waive the attorney-client privilege. McNulty Memorandum, *supra* note 2.

152. The SEC articulated its policy in the 2001 Seaboard Report, whereby it would grant leniency for cooperation with SEC investigations. Seaboard Report, *supra* note 3, at *2-3. The Seaboard Report noted generally that "when businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit promptly." *Id.* at *1. Accordingly, the SEC set forth some criteria it will consider in determining whether, and how much, to credit, among other things, cooperation, during an investigation. *Id.* at *2. In a January 2006 press release, the SEC reaffirmed the importance of cooperation in determining whether financial penalties will be imposed on corporations. Press Release, Securities and Exchange Commission, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm>.

153. See Corporate Survey Results, *supra* note 150, at 3. In January 2006, the Association of Corporate Counsel compiled the results of a survey sent to 4,700 members. *Id.* at 2 n.7. Of those responding to the survey, fifty-two percent of inside-counsel and fifty-nine percent of outside-counsel responded affirmatively to the question of whether there had been a "marked increase in waiver requests as a condition of cooperation." *Id.* at 3.

154. *In re Qwest Commc'ns Int'l*, 450 F.3d at 1199.

organizations,” “three branches of the federal government,”¹⁵⁵ and a recent district court.¹⁵⁶ Waiver requests have become so common that the U.S. Attorney for the Southern District of New York “has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain” cooperation credit.¹⁵⁷ As further evidence of the problem, a 2006 survey of over 1,200 in-house counsel and outside corporate counsel indicated a marked increase in waiver requests as a condition to receiving cooperation credit.¹⁵⁸ Recent DOJ policies have sought to curtail the routine demand for waiver through a written review process.¹⁵⁹ Unfortunately, the new DOJ guidelines impose token restraints on the ability of the government to demand a waiver and do little to curb the culture of waiver.¹⁶⁰

The Tenth Circuit failed to recognize that corporations have to make choices that greatly restrict their ability to effectively protect and defend themselves during a government investigation. By making waiver of the privilege to confidential material a prerequisite to receiving cooperation credit, the government has created a self-serving blueprint that allows them to determine whether a corporation should be indicted. With this leverage, the government can demand disclosure of “privileged information at the outset” of the investigation, and the corporation is left with “no rational choice” but to cooperate.¹⁶¹ While current DOJ and SEC policies represent a well-intentioned attempt to prevent continued corporate wrongdoing and encourage voluntary disclosure, the reality is that these policies permit the government to condition cooperation credit on the thoroughness of the disclosure by the corporation.¹⁶² In essence, government agencies exploit their power to gain a tactical advantage over corporations.

There are legitimate arguments that the benefits of DOJ and SEC policies outweigh the erosion of the attorney-client privilege and the work-product doctrine. Namely, that corporate wrongdoing can be rooted out quickly, corporate value can be protected, and the investing

155. Judson W. Starr & Michael S. Munson, *Is the Pendulum Swinging Back on Waiver Issues?*, A.B.A. ENVTL. AND ENERGY BUS. LAW REPORTER, at 8 (June 2006), available at <http://www.abanet.org/buslaw/committees/CL400000pub/newsletter/200606/starr-munson.pdf>.

156. United States v. Stein, 435 F. Supp. 2d 330, 336-37 (S.D.N.Y. 2006).

157. Letter from Robert D. Evans, American Bar Association, to the Honorable Howard Coble, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, at 3 (Mar. 3, 2006), available at http://www.abanet.org/poladv/letters/attyclient/060303letter_acprvh.pdf.

158. See Corporate Survey Results, *supra* note 150, at 2.

159. See McNulty Memorandum, *supra* note 2, at 8-11.

160. See Jonathan Peterson & Kathy M. Kristof, *U.S. Eases Its Tactics on Suspect Firms*, L.A. TIMES, Dec. 13, 2006, at C1.

161. David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 154 (2000).

162. See Corporate Survey Results, *supra* note 150, at 3. This practice will continue under the McNulty Memorandum because prosecutors “may always” consider a declination of waiver in making its charging decision and will continue to look favorably upon corporate acquiescence to government waiver requests. McNulty Memorandum, *supra* note 2, at 10.

public can be protected.¹⁶³ However, DOJ and SEC policies convey a message that longstanding privileges are not reliable in the corporate context, and are dismissive of a corporation's right to a balanced playing field in the adversarial process. Moreover, the nature of the agencies policies suggests that the government is "manipulating" the privilege, not the corporations.¹⁶⁴ The SEC and DOJ are the ones coercing corporations to waive its protections "or else,"¹⁶⁵ thus, "having their cake and eating it too."¹⁶⁶ To level the playing field and once again give corporations a valid choice on whether to disclose, DOJ and SEC policies must be abolished or amended.

2. Proposed Federal Rule of Evidence

In 2006, the Advisory Committee began accepting comments to proposed Rule 502, entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver," governing issues such as selective waiver.¹⁶⁷ The rule seeks to rectify the conflict among federal circuit courts that disclosure of protected information during a government investigation does not constitute a general waiver of attorney-client privilege or work-product protection.¹⁶⁸ Additionally, the rule purportedly furthers the "important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."¹⁶⁹

However, Rule 502(c) will not reduce the "burden, expense, and complexity associated with privilege evaluations of documents produced" during government investigations.¹⁷⁰ First, the Rule does not clearly protect materials covered by the attorney-client privilege and

163. McNulty Memorandum, *supra* note 2, at 1.

164. *See Permian Corp.*, 665 F.2d at 1221 (referring to the idea that selective waiver doctrine allows a party to manipulate use of the privilege through selective assertion).

165. *Stein*, 435 F. Supp. 2d at 352-53 (noting that the government overstepped its bounds of constitutionality when it pressured KPMG, facing indictment, into cutting off the legal fees of its former personnel). The court found that KPMG's choice to do so was improperly influenced by the Thompson Memorandum. *Id.* at 380.

166. *See Saito*, 2002 WL 31657622, at *9.

167. Report of the Advisory Committee on Evidence Rules, Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product, at 6 (June 30, 2006) [hereinafter Report of the Advisory Committee on Evidence Rules], available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>. Proposed Rule 502(c) states, in relevant part, that

a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

Id. at 7.

168. *See id.* at 13.

169. *See id.* at 14.

170. Letter from Matthew R. Gemello & Steven B. Stokdyk, Co-Chairs, Corporations Committee, of the Business Law Section of the State Bar of California, to Professor Daniel J. Capra & Administrative Office of the United States Courts, Judicial Conference Advisory Committee on the Federal Rules of Evidence, at 2 (Apr. 14, 2006), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-001.pdf>.

work-product doctrine. The ambiguous language of the Rule leaves open for interpretation what an "investigation" by an agency is, who is a "person" involved in the investigation, and what is protected disclosure material or information. Second, the proposed selective waiver rule will conflict with state evidence rules that do not recognize selective waiver. This will further exacerbate the problem because no uniform or clear rule will exist governing attorney-client relationships in all jurisdictions.¹⁷¹ Thus, selective waiver may initially provide protection in one jurisdiction but will be lost because of different treatment in another jurisdiction. Third, the proposed rule might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances.¹⁷² In essence, it may become a more coercive weapon than current government policies because it destroys any resistance argument; thus, providing the government with unfettered access to privileged materials because a federal evidence rule now protects the information.¹⁷³ Finally, the proposed rule is unclear on how a government's agreement to confidentiality may limit, or conflict, with Federal Rule of Criminal Procedure 16¹⁷⁴ and *Brady v. Maryland*.¹⁷⁵ The broad language of proposed Rule 502(c) fails to provide guidance or comfort in favor of the interpretation that Rule 502 supersedes "Rule 16 or *Brady* and its progeny."¹⁷⁶ That is not the kind of protection or certainty the attorney-client privilege is meant to foster.

B. Confidentiality Agreements: A Valid Means of Disclosure

Corporations frequently seek protection during a government investigation by entering into a confidentiality agreement with the government. Many corporations do so with the belief that confidential materials will be protected from disclosure to third-parties outside of the government investigation. Court decisions addressing the issue of selective waiver pursuant to a confidentiality agreement are less than homogeneous.¹⁷⁷ Some courts have indicated that the existence of a confidential-

171. See *McKesson HBOC Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812, 821 n.11 (Cal. Ct. App. 2004) (demonstrating that action taken in one jurisdiction that may constitute a waiver may nonetheless result in waiver in another jurisdiction).

172. See David M. Brodsky et al., *Preserving The Attorney-Client Privilege*, at 3 (Apr. 19, 2006), available at <http://www.uscourts.gov/rules/Brodsky.pdf>.

173. *Id.* at 8.

174. FED. R. CRIM. P. 16(a)(1)(B) (holding in relevant part that "upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following . . . any relevant written or recorded statement by the defendant if: the statement is within the government's possession, custody, or control; and the attorney for the government knows--or through due diligence could know--that the statement exists.").

175. 373 U.S. 83, 87 (1963) (stating that criminal defendants are entitled to information in the government's possession material to their defense).

176. Lauren Rosenblatt, *Will Selective Waiver Become A Reality Under Proposed Rule 502?*, BUSINESS CRIMES BULLETIN, Aug. 17, 2006, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1155732412262>.

177. Compare *Westinghouse Elec. Corp.*, 951 F.2d at 1429, with *In re Qwest Commc'ns Int'l*, 450 F.3d at 1194.

ity agreement is irrelevant to a waiver of privileges.¹⁷⁸ The prevailing argument among these courts rests on traditional waiver theories that disclosure to a third-party waives to all,¹⁷⁹ and because the attorney-client privilege and work-product doctrine are not “creatures of contract.”¹⁸⁰ The Advisory Committee on Rule 502 objects to confidentiality agreements entered into prior to disclosure, arguing that disputes will likely arise over the particulars of the confidentiality agreement.¹⁸¹ Yet other courts, including the Tenth Circuit in *Qwest*,¹⁸² indicate that the existence of a confidentiality agreement does not foreclose selective waiver if the agreement actually restricts use of the documents.¹⁸³

Instead of adopting a per se rule that a confidentiality agreement is or is not valid, courts should evaluate waiver pursuant to a confidentiality agreement on a case-by-case basis.¹⁸⁴ Some factors to take into account include the following: (1) whether waiver is necessary for the government to uncover the information in the first place; (2) the reasonable precautions taken to protect the waiver documents; (3) the scope of the waiver; (4) who is benefited by the waiver; and (5) the overreaching issues of fairness.¹⁸⁵ Evaluating selective waiver on a case-by-case basis is beneficial because it does not automatically give protection to a corporation where the confidentiality agreement does little to protect the documents, as was the case in *Qwest*,¹⁸⁶ and gives protection to others where the confidentiality agreement strictly construes the waiver provisions. Moreover, allowing confidentiality agreements that contain adequate protection encourages self-policing and prompt disclosure by corporations without fear that waiver to the government will result in subsequent disclosure to actual or potential adversaries.¹⁸⁷ Although corporations

178. See, e.g., *Westinghouse Elec. Corp.*, 951 F.2d at 1430; *In re Columbia/HCA*, 293 F.3d at 303.

179. See *Dellwood Farms, Inc.*, 128 F.3d at 1127.

180. *In re Columbia/HCA*, 293 F.3d at 303.

181. Report of the Advisory Committee on Evidence Rules, *supra* note 166, at 14.

182. *In re Qwest Commc'ns. Int'l*, 450 F.3d at 1194 (not strictly precluding the use of confidentiality agreements, but rather, stating that *Qwest* confidentiality agreement did little to restrict the SEC's and DOJ's use of the materials they received from *Qwest*).

183. See *Steinhardt Partners*, 9 F.3d at 236; *In re Natural Gas Commodities Litig.*, No. 03CIV.6186 (VM)(JCF), 2005 WL 3288007, at *2 (S.D.N.Y. Dec. 2, 2005); Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of the Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 62-67 (1997) (setting forth factors courts have examined when evaluating a confidentiality agreement purportedly protecting privileged documents).

184. This position is congruent with the wording of Federal Rule of Evidence 501 that allows courts to create rules on a case-by-case basis that conform with Rule 501. See FED. R. EVID. 501. Commentary to the rule states that “Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis . . .” FED. R. EVID. 501, Commentary by Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin.

185. See GERGACZ, *supra* note 31, §§ 5.11, 5.13-5.16.

186. See *In re Qwest Commc'ns Int'l*, 450 F.3d at 1194.

187. See Brief of the Securities and Exchange Commission as Amicus Curiae Supporting Intervenor-Appellant, *Mckesson Corp.*, at *4, 403 F.3d 1048 (2006) (No. 03-10511); *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2004).

may gain from disclosing material through a confidentiality agreement, they do so at the expense of divulging “highly sensitive and incriminating information” and are not absolved from liability of the acts disclosed.¹⁸⁸

There is a balance already in play whether a corporation should air its grievances in order to cooperate or force the government to go it alone at the cost of more stringent treatment and increased expense.¹⁸⁹ A practical rule that allows waiver pursuant to a confidentiality agreement that explicitly states which documents are being disclosed and to what extent, further strengthens the genuineness of the corporations’ desire to maintain protection to the documents¹⁹⁰ and prevents use of waiver as a tactical advantage. While this may not absolutely forestall a government agency from disclosing the material,¹⁹¹ it may provide the corporation with a shield of protection, not a sword, should litigation arise over the terms of the confidentiality agreement.¹⁹²

On a practical level, society demands an assessment of the action or inaction of the corporation in terms broader than merely the corporation’s waiver. The significance of intent should not be overlooked through a knee-jerk reaction that rejects outright the theory of selective waiver.¹⁹³ Applying objective standards of interpretation to a confidentiality agreement, including the factors outlined above, it becomes difficult to reject selective waiver. Such a rule accounts for the intent of the corporation and continues to treat carelessness and negligence as subversive to the underlying purposes of the attorney-client privilege.

C. Public Policy Favors a Practical Selective Waiver Rule

The preference for or against selective waiver is nothing more than a policy consideration and has very little to do with furthering the principles of the attorney-client privilege.¹⁹⁴ What has to be weighed is the prohibition on waivers that will likely aid public regulatory agencies against the public good that will result from thorough government investigations. In reality, continued prohibition against selective waiver modestly benefits the attorney-client privilege, while decreasing the efficacy of costly governmental investigations.

188. See *Saito*, 2002 WL 31657622, at *8.

189. *Id.*

190. See *In re Steinhardt Partners*, 9 F.3d at 235.

191. See, e.g., *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 646 (C.D. Cal. 2005) (finding confidentiality agreement under which SEC could disclose documents as required by law or in furtherance of its discharge of its duties and responsibilities to be “conditional” and thus “inconsistent with those cases . . . allowing selective waiver.”).

192. See *Columbia/HCA*, 293 F.3d at 306-07 (referring to the attorney-client privilege, the court states that “there is no reason to transform the work product doctrine into another ‘brush on the attorney’s palette,’ used as a sword rather than a shield.”).

193. See *id.* at 307.

194. *Id.* at 311 (Boggs, J., dissenting) (finding that the “exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege”).

Upjohn stated that an asserted privilege must "serve[] public ends."¹⁹⁵ A practical selective waiver rule will serve public ends by increasing judicial economy and fairness among parties. The public interest is clearly served when the government can expeditiously root out and prosecute wrongdoing and provide prompt relief to injured parties.¹⁹⁶ Conversely, the public interest is not well-served when the government is forced to obtain information through lengthy investigations that consume precious government resources.¹⁹⁷ In contrast to the significant public interest in recognizing a selective waiver privilege, a per se rule against selective waiver in the government investigation context will exclude reliable and probative evidence of wrongdoing.¹⁹⁸

The Tenth Circuit cites *Branzburg v. Hayes*¹⁹⁹ and the absence of a selective waiver privilege from the nine specific privileges drafted by the Judicial Conference Advisory committee, as evidence that a new selective waiver rule should not be allowed.²⁰⁰ In *Branzburg*, the Supreme Court declined to create a new reporters' privilege against compulsion from testifying before a grand jury given the lack of evidence that such a privilege would restrict the flow of news to the public.²⁰¹ The Supreme Court noted the public interest of pursuing and punishing criminal behavior outweighs the interest in possible future news stories.²⁰² If the public interest in pursuing and punishing criminal behavior in the corporate context is of such tantamount importance, why would a selective waiver rule directed at that very goal, be unwise? Moreover, in rejecting the proposed nine privileges and enacting Rule 501, Congress manifested an affirmative intention not to "freeze the law of privilege."²⁰³ Because Congress rejected the Advisory Committee's nine-privilege proposal, the Advisory Committee Note to Rule 501 is, unlike the Notes to most of the other Rules, not to be solely relied on in construing the Rule. Rule 501 was introduced to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," and to allow change.²⁰⁴ The law occasionally adheres to concepts long after experience suggests that a

195. *Upjohn*, 449 U.S. at 389.

196. See *Trammel v. United States*, 445 U.S. 40, 50 (1980) (privileges may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting))).

197. See *Saito*, 2002 WL 31657622, at *8 (recognizing that "[e]ncouraging corporations to disclose their internal investigations confidentially allows the SEC to resolve its investigations expeditiously and efficiently.").

198. See *Jaffee v. Redmond*, 518 U.S. 1, 18-19 (1996) (Scalia, J., dissenting) (referring to the occasional injustice that will result from a categorical rule excluding all reliable and probative evidence).

199. 408 U.S. 665 (1972).

200. See *In re Qwest Commc'ns. Int'l*, 450 F.3d at 1197.

201. See *Branzburg*, 408 U.S. at 693-94.

202. *Id.* at 695.

203. *Trammel*, 445 U.S. at 47.

204. *Id.* (internal citations omitted).

change is necessary.²⁰⁵ Reason and experience no longer justify so restrictive a privilege in the corporate investigation context.

Modification to the attorney-client privilege furthers the important public interest in transparent corporate investigations without unduly burdening the adversarial system.²⁰⁶ By protecting the documents, third-party plaintiffs will be hard pressed to form a valid argument that they will be adversely affected by not having access to the documents because they would not be privy to the information in the first place.²⁰⁷ Furthermore, if the third-party can show sufficient need for the materials, they will be able to obtain them through a court order.²⁰⁸ Thus, the justification for rejecting selective waiver seems “inadequate to override the strong public interest such a rule would serve.”²⁰⁹ Because litigants should have a reasonable expectation of privacy in disclosure of materials during a government investigation, a rule of selective waiver should be adopted.

D. Employee Communications with Corporate Counsel

Parties opposing selective waiver continually point to the purported “chilling” affect such a rule may have on employee communication with corporate counsel.²¹⁰ However, given the nature of the employee/employer relationship, how likely is it that an employee will be discouraged from disclosing pertinent information out of fear of disclosure in subsequent litigation?²¹¹ Not a single circuit court case, bar association study, or scholarly article has provided a concrete answer; and they cannot possibly because it depends entirely on the scope of the waiver, which the courts have been unable to delineate.²¹² The mere fact

205. *Funk v. United States*, 290 U.S. 371, 382 (1933) (declining to “enforce the ancient rule of the common law under conditions as they now exist.”); *see also* *Francis v. S. Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting) (“When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule’s creator to destroy it.”).

206. *See Saito*, 2002 WL 31657622, at *10-11.

207. *Upjohn*, 449 U.S. at 395 (“Application of the attorney-client privilege to communication such as those involved here . . . puts an adversary in no worse position than if the communication had never taken place.”); *Columbia/HCA*, 293 F.3d at 309 (Boggs, J., dissenting) (finding that the “exclusion of privileged information conceals no probative evidence that would otherwise exist without the privilege.”); *Westinghouse Elec. Corp.*, 951 F.2d at 142 n.14 (noting that it is not “inherently unfair for a party to selectively disclose privileged information in one proceeding but not another” because “when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred.”); *Saito*, 2002 WL 31657622, at *6 (“fairness has little relevance in the context of selective waivers . . . because disclosure to one adversary does not prejudice a subsequent adversary any more than it would have if the initial disclosure had never been made.”).

208. *See* FED. R. CIV. P. 26(b)(3); *Hickman*, 329 U.S. at 511 (holding that “[w]here relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.”).

209. *See Saito*, 2002 WL 31657622, at *10.

210. *See* Brodsky, *supra* note 172, at 5 (referring to the uncertainty employees will feel if there are no reliable privilege protections).

211. *See Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

212. *See* Hon. Arlen Specter & Hon. Patrick Leahy, *Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System*,

that a legal communication was made in an express or implied confidential relationship, such as between an employee and corporate counsel, does not create or guarantee a privilege.²¹³ Corporate obligations to maintain promised confidentiality is limited to the amount of confidentiality organizations have within their power granted by the law. Thus, organizations cannot promise to keep factual revelations confidential in the face of a valid discovery request that does not improperly invade the attorney-client privilege.

Finally, there is no guarantee that an employee who discloses misconduct to corporate counsel will not end up being the scapegoat at the expense of a more legally sophisticated superior, who manages to remain silent.²¹⁴ In other words, it is possible that the flawed attorney-client dynamic that commentators attribute to government waiver policies actually pre-dates selective waiver.²¹⁵ As a result, the alarms and doomsday predictions over the degradation of the attorney-client privilege as a result of persistent waiver requests, could be much ado about nothing.

In essence, the only real protection an employee has is silence.²¹⁶ But rarely do employees keep quiet about wrongdoing, either out of fear of losing employment, loyalty to the company, or apprehension about opposing a superior who has asked the employee to disclose the wrongdoing.²¹⁷ Whether the employee knows it or not, their communication with corporate counsel is already "chilled," and there is no concrete evidence that disclosure of that information during a government investigation will exacerbate that problem.

CONCLUSION

In today's enforcement environment, a waiver is not voluntary in a real-world sense.²¹⁸ The majority of courts have not caught on to that fact and rule that the resulting disclosures are sufficiently voluntary to

U.S. Senate Judiciary Committee, at 11 (Sept. 12, 2006), <http://www.acca.com/public/attyclientpriv/coalitionsenjudtestimony.pdf>. The submission reported statistics from the survey conducted by the Association of Corporate Counsel that in-house lawyers "believe" there will be a chilling effect on the candor of information from client. *Id.*

213. WIGMORE, *supra* note 14, § 2286 ("No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice."); see *Branzburg*, 408 U.S. at 682 n.21.

214. See *United States v. Bernstein*, 533 F.2d 775, 788 (2d Cir. 1976) (observing that a corporation could advance a defense that an employee had acted "ultra vires" on his own); MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2000); LERMAN, *supra* note 13, at 185.

215. Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 904 (2006).

216. *White*, 322 U.S. at 698-99.

217. Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than The Model Rules Provide?*, 23 IND. L. REV. 1, 18-20 (1990).

218. See Statement of Karen J. Mathis, President of the American Bar Association, before the Committee on the Judiciary, at 4-5 (Sept 12, 2006) [hereinafter Statement of Karen J. Mathis], available at <http://www.abanet.org/>.

constitute a waiver.²¹⁹ Thus, the common law does not take full consideration of the legal authority wielded by government agencies to influence a waiver. In failing to recognize the pressures corporations face to disclose materials and the lack of protection provided by current government practices and procedures, the Tenth Circuit, along with many other courts and commentators, has lost sight of the larger picture in an effort to protect the attorney-client privilege.

Now, more than ever, corporations have minimal protection from government waiver requests. Since the DOJ and SEC have not adequately addressed their current practices,²²⁰ and because the courts cannot seem to come to an understanding or define a clear rule regarding selective waiver, Congress will have to address the matter.²²¹ Congress is the correct body of government to address the issue because a proposed rule will alter the balance between two conflicting aspects of public policy and will alter local variations that previously had undesirable or ineffective results.²²² Furthermore, Congress can override the conflicting case law and reach beyond limitations imposed on federal rules to enact a statute applicable in the state courts and other forums not governed by Federal Rules of Evidence.²²³ With this oversight capacity, Congress can send a message that current government policies that seek waivers and the practical interpretations of prosecutors applying them are at odds with the long-standing values of our jurisprudential system.²²⁴

219. See *Stein*, 435 F. Supp. 2d at 353 (noting that the government overstepped its bounds of constitutionality when it pressured KPMG, facing indictment, into cutting off the legal fees of its former personnel. The court found that KPMG's choice to do so was improperly influenced by the Thompson Memorandum).

220. See *supra* notes 2-4 and accompanying text.

221. Congress is the correct governing body to enact a selective waiver rule because they have congressional authority, conferred by the Commerce Clause, to regulate the Securities and Exchange Commission. See *Wright v. SEC*, 112 F.2d 89, 94-95 (2d Cir. 1940) (finding the Securities Exchange Act of 1934 is a valid delegation of constitutional power under the commerce clause). Similarly, the Department of Justice is authorized, as an executive agency under the Judiciary Act of 1870, to enforce criminal and civil laws enacted by Congress. See *Judiciary Act of 1870*, ch. 150, 16 Stat. 162 (1870); see also *Touby v. United States*, 500 U.S. 160, 164-65 (1991) (finding that executive agencies may be called upon to enforce laws enacted under Congress' Article I powers). Therefore, Congress, after enacting a selective waiver law, may call on other branches to assist in its enforcement.

222. See *Branzburg*, 408 U.S. at 706 (suggesting that Congress or the state legislatures should consider implementing a proposed privilege); 28 U.S.C.A. § 2074(b) (West 2007) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress."); see Statement of Karen J. Mathis, *supra* note 218, at 13.

223. See *Rosenblatt*, *supra* note 176; see also *Testa v. Katt*, 330 U.S. 386, 389 (1947) (stating the proposition that state courts cannot refuse to apply federal law, a conclusion mandated by the Supremacy Clause of the United States Constitution); *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962))); *In re Grand Jury Proceedings*, 103 F.3d 1140, 1155 (3d Cir. 1997) (Congress "has recognized the importance of privilege rules insofar as the truth-seeking process is concerned . . . It did so by identifying and designating the law of privileges as a special area meriting greater legislative oversight").

224. See Statement of Karen J. Mathis, *supra* note 218, at 13-14.

The question then becomes: To what extent selective waiver should be codified through congressional action? The popular “pro-privilege/anti-waiver”²²⁵ stance rejects selective waiver because it purportedly weakens the attorney-client privilege;²²⁶ however, this position fails to account for situations where a party exercised reasonable care and prudence to protect information from disclosure to third parties, such as a confidentiality agreement.²²⁷ Other means, such as a new rule of evidence, will provide scant relief from the problems that already plague corporations. Reconstituting the privilege in such a way that takes into consideration the current and foreseeable state of affairs will resolve the circuit split and confirm the notion that privileges are not set in stone; but rather, are meant to evolve over time.²²⁸ Thus, reform efforts should be directed towards defining the attorney-client privilege in a way that preserves the protection in its most fundamental form, while encouraging corporations to disclose information only in limited circumstances and upon strict conformity with codified standards.

*Adam Aldrich**

225. Brown, *supra* note 215, at 951.

226. See generally Statement of Karen J. Mathis, *supra* note 218.

227. Senator Spector of Pennsylvania introduced an attorney-client privilege bill in late 2006 that addressed problems that have developed since the Thompson Memorandum; however, the ambiguous language of the proposal leaves open important questions concerning violations and remedies if the law is broken. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007), available at <http://www.acc.com/public/attyclientpriv/thompsonmemoleg.pdf>. Furthermore, the categorical prohibition against waivers may create a worse situation than what we have now because attorneys could stonewall prosecutors and render any investigation dead in the water. While Senator Spector’s bill is a well intentioned attempt to thwart the policies of various government agencies, several issues need to be explored and clarified if Congress is going to pursue this or a similar bill.

228. See *Hawkins v. United States*, 358 U.S. 74, 79 (1958) (changes in privileges may be “dictated by ‘reason and experience’”).

* J.D. Candidate 2008.

FEDERAL SENTENCING AND THE UNCERTAIN FUTURE OF REASONABLENESS REVIEW

INTRODUCTION

This spring, the United States Supreme Court will consider how appellate courts have implemented the United States Sentencing Guidelines (“Guidelines”)¹ since rendering its opinion in *United States v. Booker*.² At issue is whether the courts have violated *Booker* by giving the Guidelines excessive weight when reviewing district court sentences.³

Issued in 2005, *Booker* held that mandatory Guidelines violated a defendant’s Sixth Amendment right to a jury trial because they required judges instead of juries to find facts that enhanced sentences.⁴ The Court remedied the constitutional violation in a separate opinion by excising two provisions from the federal sentencing statute.⁵ The first, 18 U.S.C. § 3553(b)(1), had mandated guideline sentences.⁶ Removing this provision rendered the Guidelines “effectively advisory,”⁷ just one factor among several that district courts would “consult”⁸ when imposing a sentence under 18 U.S.C. § 3553(a).⁹ The court also excised a second

1. U.S. SENTENCING GUIDELINES MANUAL (2006) [hereinafter USSG], available at <http://www.ussc.gov/2006guid/TABCON06.htm>.

2. 543 U.S. 220 (2005). The Supreme Court granted certiorari in two cases relating to the Guidelines: *United States v. Rita* (No. 06-5754) and *United States v. Claiborne* (No. 06-5618). Supreme Court of the United States, *Miscellaneous Orders of the Court (certiorari granted)*, November 3, 2006, <http://www.supremecourtus.gov/orders/courtorders/110306pzr.pdf>.

3. See *Miscellaneous Orders of the Court*, supra note 2.

4. *Booker*, 543 U.S. at 226–27 (finding that the Sixth Amendment applied to mandatory Guidelines). For an overview of *Booker*, see Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005).

5. *Booker*, 543 U.S. at 245, 259.

6. *Id.* at 245. Note that before *Booker*, district courts could depart from the Guidelines range, but only in certain limited circumstances. See 18 U.S.C. § 3553(b)(1) (2000).

7. *Booker*, 543 U.S. at 245.

8. *Id.* at 264.

9. 18 U.S.C. § 3553(a) reads:

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

provision relating to appellate standards of review of the mandatory guideline sentences, 18 U.S.C. § 3742(e).¹⁰ *Booker* articulated a new appellate standard whereby courts would review sentences for “unreasonableness” in light of the § 3553(a) factors.¹¹

Though *Booker* was clear that the Guidelines’ role in sentencing and appellate review had changed, it was unclear exactly *how*.¹² The Court did not explain what it would mean for judges to “consult” the “effectively advisory” Guidelines, nor did it explain what weight they would have among the § 3553(a) sentencing factors.¹³ The now-amputated sentencing statute was similarly unclear, simply listing the Guidelines among the sentencing factors.¹⁴ Lacking specific guidance from either *Booker* or the statute, federal courts themselves identified a place for the Guidelines in the post-*Booker* landscape.

Some courts interpreted *Booker* as inaugurating a “sea change in sentencing” and in the role of the Guidelines.¹⁵ This “*Booker* maximalism”¹⁶ viewed *Booker* as having transformed a guideline-centric sentenc-

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission . . . subject to any amendments made to such guidelines by act of Congress . . . ; and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . . taking into account any amendments made to such guidelines or policy statements by an act of Congress . . . ;

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission . . . subject to any amendments made to such policy statement by an act of Congress . . . ; and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Id.

10. *Booker*, 543 U.S. at 259.

11. *Id.* at 260–61. The § 3553(a) factors are listed *supra* note 9.

12. See David J. D’Addio, Note, *Sentencing After Booker: The Impact of Appellate Review on Defendants’ Rights*, 24 YALE L. & POL’Y REV. 173, 176 (2006); Adam Lamparello, *The Unreasonableness of “Reasonableness” Review: Assessing Appellate Sentencing Jurisprudence after Booker*, 18 FED. SENT’G REP. 174 (2006); Frank O. Bowman, III, *The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1350 (2005) (“What *Booker* has done depends on what *Booker* means. If [the opinion] is prescribing ‘advisory’ guidelines in the purse sense of helpful, but legally nonbinding advice to sentencing judges, this ruling would certainly transform the nature of federal sentencing . . .”).

13. See sources cited *supra* note 12. The potential problem of this ambiguity did not go unnoticed at the time. See *Booker*, 543 U.S. at 311 (Scalia, J., dissenting in part) (“[N]o one knows . . . how advisory Guidelines and ‘unreasonableness’ review will function in practice.”).

14. The Guidelines are listed as the fourth factor, § 3553(a)(4). See also *Booker*, 543 U.S. at 304–05 (Scalia, J., dissenting in part) (noting that the sentencing statute “provides no order of priority among all [the § 3553(a)] factors”).

15. Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 666–67 (2006).

16. *Id.* at 666.

ing system into one where judges “exercise reasoned judgment in the course of a holistic sentencing decision-making process.”¹⁷ *Booker* maximalism relied on a plain reading of *Booker* and § 3553(a) in arguing that the Guidelines no longer had a privileged place in sentencing. Instead, they were “just one of a number of sentencing factors” for judges to consider.¹⁸

Other courts interpreted *Booker* as having made only a “modest adjustment” to the Guidelines’ role in sentencing.¹⁹ This “*Booker* minimalism”²⁰ saw the Guidelines, while no longer mandatory, as nevertheless meriting “considerable weight” in sentencing and on appellate review.²¹ *Booker* minimalism had different contours among different courts,²² but its essence was always the same—i.e., that the Guidelines have a disproportionate weight vis-à-vis the other § 3553(a) factors.²³ Courts justified this approach by arguing, for example, that the Guidelines accounted for the other § 3553(a) factors²⁴ or that they had a special role in promoting sentencing uniformity.²⁵

Booker directed appellate courts to review district court sentences for “unreasonableness,”²⁶ and several circuits adopted distinctly *Booker* minimalist methods for doing so. One method treated guideline sentences as “presumptively reasonable” when reviewed on appeal.²⁷

17. Douglas A. Berman, *Sentencing and Punishment: Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 412 (2006).

18. United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005); see also Simon v. United States, 361 F. Supp. 2d 35, 40 (D.N.Y. 2005). The *Ranum* opinion was the most prominent early articulation of *Booker* maximalism. See NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 57 (Supp. 2005).

19. McConnell, *supra* note 15, at 666–67.

20. *Id.* at 666.

21. United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005) (describing the prominent role of the Guidelines in sentencing); United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006) (describing the “heavy weight” given to the Guidelines on appellate review). The *Wilson* opinion, issued less than 24 hours after the Supreme Court handed down *Booker*, was the most prominent early articulation of *Booker* minimalism. See DEMLEITNER ET AL., *supra* note 18, at 56.

22. See discussion *infra* Part III.A–B, Part IV.B.1.

23. See McConnell, *supra* note 15, at 667.

24. See, e.g., United States v. Johnson, 445 F.3d 339, 342–43 (4th Cir. 2006) (asserting that the Guidelines incorporate the § 3553(a) factors); United States v. Buchanan, 449 F.3d 731, 735 (6th Cir. 2006) (Sutton, J., concurring) (“[T]he guidelines remain the one § 3553(a) factor that accounts for all § 3553(a) factors.”); *Terrell*, 445 F.3d at 1265 (10th Cir. 2006) (“The Guidelines, rather than being at odds with the § 3553(a) factors, are instead the expert attempt of an experienced body to weigh those factors in a variety of situations.”).

25. See, e.g., *Wilson*, 350 F. Supp. 2d at 912; United States v. Jimenez-Beltre, 440 F.3d 514, 519 (1st Cir. 2006) (en banc) (“To construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective.”); *Buchanan*, 449 F.3d at 738 (Sutton, J., concurring) (“Where else, at any rate, would a court of appeals start in measuring the reasonableness of a sentence?”); United States v. Maloney, 466 F.3d 663, 668 (8th Cir. 2006).

26. *Booker*, 543 U.S. at 260–61.

27. Six circuits have held that guideline sentences are presumptively reasonable. See United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 555 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Mykytiuk,

Courts would uphold these guideline sentences unless a party could show unreasonableness in light of other § 3553(a) sentencing factors.²⁸ A second popular *Booker* minimalist method of reasonableness review, “proportionality,” required that district courts provide “compelling reasons” whenever a sentence “substantially varie[d]” from the guideline range.²⁹

This spring, the Supreme Court will consider whether these two *Booker* minimalist methods—presumptive reasonableness and proportionality—can be part of a valid review for reasonableness.³⁰ An examination reveals that both are incompatible with *Booker* whenever there are nonfrivolous § 3553(a) factors present for which the Guidelines either fail to account or for which they inadequately account.

Part I of this comment outlines the Tenth Circuit’s *Booker* minimalist approach to reasonableness review, including its adoption of both presumptive reasonableness and proportionality. Part II analyzes this approach and the justifications the court offers for it. It also critiques the court’s apparent failure to address the “parsimony provision” at the heart of § 3553(a). Part III argues that *Booker* minimalism is not unique to the Tenth Circuit and that *all* of the other circuits share a guideline-centric approach. Differences among circuits that have and have not adopted presumptive reasonableness or proportionality, for example, tend to be superficial rather than substantive. Part IV reviews what this spring’s two Supreme Court cases will mean for *Booker* minimalism. The superficiality of the circuit disagreements about the issues the Court will consider and the unusual facts in one of the cases raise interesting questions about just what impact the decisions will have. Even if the Supreme Court holds that presumptive reasonableness and proportionality are invalid methods of reasonableness review, it may have less of an impact on *Booker* minimalism than might appear. Finally, Part V offers one approach to reasonableness review that rejects presumptive reasonableness and proportionality whenever the Guidelines fail to account for or inadequately account for nonfrivolous factors that are properly considered under § 3553(a). This approach would provide an appropriate balance between guideline-centric *Booker* minimalism and the requirements of *Booker* and § 3553(a).

415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006).

28. See, e.g., *Mykytiuk*, 435 F.3d at 608; *Kristl*, 437 F.3d at 1055.

29. See, e.g., *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *United States v. Collington*, 461 F.3d 805, 808 (6th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006); *United States v. Martin*, 455 F.3d 1227, 1236–37 (11th Cir. 2006).

30. See *Miscellaneous Orders of the Court*, *supra* note 2.

I. *BOOKER* MINIMALISM AND THE TENTH CIRCUIT

*United States v. Booker*³¹ requires appellate courts to review district court sentences for reasonableness in light of the sentencing factors in 18 U.S.C. § 3553(a).³² These factors include the nature of the offense and characteristics of the defendant, as well as the need for the sentence to reflect the seriousness of the crime, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment.³³ The statute also requires courts to consider the Guidelines.³⁴ If a sentence is unreasonable in light of these factors, it must be reversed.³⁵

While the Guidelines are only one § 3553(a) sentencing factor, the essence of *Booker* minimalism is that they nevertheless have special weight compared to the other factors.³⁶ In its review of both guideline and non-guideline sentences, the Tenth Circuit has adopted this *Booker* minimalism. The court's preference for the Guidelines, though, is checked by procedural requirements that ensure consideration of other relevant § 3553(a) factors.

A. Components of Reasonableness Review and the Adoption of Presumptive Reasonableness

The Tenth Circuit outlined its approach to reasonableness review and embraced *Booker* minimalism in *United States v. Kristl*.³⁷ In *Kristl*, the defendant pled guilty to knowingly possessing a firearm after having been convicted of a felony.³⁸ The district court calculated his guideline range at 24–30 months, and sentenced him to 28 months.³⁹ The defendant challenged the district court's guideline calculation and argued that the sentence was unreasonable in light of *Booker*.⁴⁰ While all of the § 3553(a) factors guide reasonableness review,⁴¹ *Kristl*'s guideline-specific appeal allowed the court to focus on the role of the Guidelines.

The court adopted a two-part approach to its sentencing review that identified both procedural and substantive components of reasonableness.⁴² Procedural reasonableness asks whether a district court's sen-

31. 543 U.S. 220 (2005).

32. *Booker*, 543 U.S. at 261.

33. 18 U.S.C. § 3553(a)(1)-(2) (2000). All of the § 3553(a) factors a district court must consider are listed *supra* note 9.

34. § 3553(a)(4).

35. *Booker*, 543 U.S. at 261.

36. See McConnell, *supra* note 15, at 667.

37. 437 F.3d 1050 (10th Cir. 2006).

38. *Kristl*, 437 F.3d at 1052.

39. *Id.* at 1052–53.

40. *Id.* at 1053.

41. *Id.*

42. *Id.* at 1055 (“[T]he reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated.”).

tence was “reasoned, or calculated using a legitimate method.”⁴³ In addition to a properly calculated guideline range,⁴⁴ procedural reasonableness requires a district court to “consider[] the § 3553(a) factors and explain[] its reasoning” for imposing a particular sentence.⁴⁵ An improper guideline calculation or failure to consider a relevant § 3553(a) factor renders a sentence procedurally unreasonable and therefore reversible.⁴⁶ Because claims of procedural unreasonableness assert that the district court made a legal error, they are reviewed *de novo* on appeal.⁴⁷

The second part of appellate reasonableness review is substantive.⁴⁸ It asks whether “the underlying facts and conclusions support [the] particular sentence [length]” in light of the § 3553(a) factors.⁴⁹ To assist in this review for substantive reasonableness, the Tenth Circuit adopted a *Booker* minimalist approach that gave the Guidelines a prominent role.⁵⁰ In particular, *Kristl* endorsed the approach of a number of other circuits in holding that sentences within the guideline range are presumed reasonable on appeal.⁵¹ This presumption of reasonableness is a “deferential standard”⁵² that either a defendant or the government can rebut in light of other § 3553(a) factors.⁵³ In the absence of such a rebuttal, however, a guideline sentence will be upheld as reasonable.⁵⁴

After identifying the components of reasonableness review, *Kristl* turned to the defendant’s sentence.⁵⁵ The court faulted the district court’s guideline calculation, finding that it had improperly accounted for the defendant’s criminal history.⁵⁶ This error rendered the sentence procedurally unreasonable and resulted in a remand for resentencing.⁵⁷

43. *United States v. Cage*, 451 F.3d 585, 591 (10th Cir. 2006); *see also Kristl*, 437 F.3d at 1054–55.

44. *Kristl*, 437 F.3d at 1055. The Guidelines must always be calculated in every sentencing decision, as they are listed in § 3553(a) as one of the factors that a sentencing judge must consider. *See United States v. Gonzalez-Huerta*, 403 F.3d 727, 748–49 (10th Cir. 2005).

45. *Cage*, 451 F.3d at 591.

46. *Id.*; *Kristl*, 437 F.3d at 1058–59.

47. *See Kristl*, 437 F.3d at 1054 (noting a *de novo* review for claims that “consider[] the district court’s application” of the Guidelines or the other § 3553(a) factors); *cf. United States v. Brown*, 450 F.3d 76, 80 (1st Cir. 2006) (“We review the district court’s interpretation of the Guidelines *de novo*.”).

48. *Kristl*, 437 F.3d at 1055.

49. D’Addio, *supra* note 12, at 178.

50. *Kristl*, 437 F.3d at 1055.

51. *Id.* at 1053–55 (citing the adoption of presumptive reasonableness for guideline sentences in the Fifth, Sixth, Seventh, and Eighth circuits, and adopting the presumption in the Tenth Circuit as well).

52. *Id.* at 1054.

53. *Id.* at 1055.

54. *See id.*

55. *Id.*

56. *Id.* at 1058–59.

57. *Id.* at 1059.

The framework for reasonableness review outlined in *Kristl* would guide the Tenth Circuit in subsequent inquiries.⁵⁸ In addition to identifying procedural and substantive components of reasonableness, *Kristl* held that guideline sentences are presumed substantively reasonable. This adoption of presumptive reasonableness marked the Tenth Circuit's endorsement of *Booker* minimalism. The presumption meant that the Guidelines would be the one § 3553(a) factor that always had to be considered and that would serve as the starting point in reasonableness review.⁵⁹ Presumptive reasonableness also gave the Guidelines a disproportionate weight among the § 3553(a) sentencing factors because it presumed—in the absence of other evidence—that the Guidelines correspond to reasonableness.⁶⁰ No other § 3553(a) factor had this special weight.⁶¹

B. Substantive Unreasonableness and Proportionality

The Tenth Circuit's method of reviewing non-guideline sentences provides more evidence of *Booker* minimalism's prominence in the court.

In *United States v. Cage*,⁶² the court vacated a procedurally reasonable non-guideline sentence after finding it substantively unreasonable.⁶³ In that case, the defendant pled guilty to methamphetamine distribution charges.⁶⁴ Her offense level and criminal history yielded a guideline range of 46–57 months.⁶⁵ The district court imposed a six-day sentence,⁶⁶ however, citing mitigating § 3553(a) factors as justification for the variance.⁶⁷ The factors included the defendant's son's medical problems, the defendant's minor role in the conspiracy, her lack of criminal history, her education, employment history, and the unlikelihood she would reoffend.⁶⁸ *Cage* held that the district court properly considered

58. A number of subsequent Tenth Circuit reasonableness review cases cited *Kristl*. See, e.g., *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006); *Cage*, 451 F.3d at 591; *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1116–17 (10th Cir. 2006).

59. *Kristl*, 437 F.3d at 1055; *Terrell*, 445 F.3d at 1264 (“The Guidelines continue to be the starting point . . . for this court’s reasonableness review on appeal.” (citing *United States v. John H. Sitting Bear*, 436 F.3d 929, 935 (8th Cir. 2006) (internal quotation marks omitted))).

60. See *Kristl*, 437 F.3d at 1055.

61. See, e.g., *Cage*, 451 F.3d at 593 (noting that the Guidelines are “not just one factor among many”); see also discussion *infra* Part I.B–C.

62. 451 F.3d 585 (10th Cir. 2006).

63. *Cage*, 451 F.3d at 591. *Cage* was the Tenth Circuit’s first substantively unreasonable sentence after *Booker*. *Id.* (“This is an issue of first impression for this court; we have neither explained what causes a sentence below the recommended guidelines range sentence to be unreasonable, nor how such decisions are treated on appeal.”). Recall that in *Kristl*, the court vacated the defendant’s sentence on procedural rather than substantive grounds. *Kristl*, 437 F.3d at 1058–59.

64. *Cage*, 451 F.3d at 587.

65. *Id.* at 588.

66. *Id.*

67. *Id.* at 588, 595.

68. *Id.* at 595.

these mitigating factors under § 3553(a).⁶⁹ The problem with the sentence, however, was in “the weight the district court placed on [the factors].”⁷⁰

Cage then articulated a distinctly *Booker* minimalist method—proportionality—of evaluating the substantive reasonableness of non-guideline sentences.⁷¹ Here, the six-day sentence was well below the guideline range and not entitled to a presumption of reasonableness.⁷² The presumption of reasonableness for guideline sentences, however, “[spoke] to how [the court] should consider sentences *outside* the guidelines range” as well.⁷³ The court held that for a non-guideline sentence to withstand review for substantive reasonableness, the mitigating § 3553(a) factors must be proportional to the extent of the variance from the guideline range.⁷⁴ Thus, an extraordinary variance “must be supported by extraordinary circumstances.”⁷⁵ Applying the method to the facts before it, *Cage* held that the sentence was unreasonable because the defendant’s circumstances did not justify such an “extraordinary” variance.⁷⁶

Though the variance in *Cage* was extreme, the case highlights the influence of *Booker* minimalism in the Tenth Circuit’s reasonableness review. Regardless of the length of a sentence, the Guidelines are the central measure of reasonableness. Sentences falling within them are presumptively reasonable,⁷⁷ while those falling outside of them must be supported by justifications proportional to the variance.⁷⁸

The Tenth Circuit’s reasonableness review for guideline as well as non-guideline sentences therefore reflects a *Booker* minimalist approach.

69. *Id.* The *Cage* court did not explore the fact that some of the mitigating § 3553(a) factors cited by the district court as reasons for varying the sentence downward were already accounted for in the Guidelines. For example, a defendant’s guideline offense level is already lowered if a defendant had a “minimal” or “minor” role in the criminal activity. See USSG, *supra* note 1, § 3B1.2. The Guidelines also account for a defendant’s lack of criminal history. See *id.* § 4A1.1.

70. *Cage*, 451 F.3d at 595.

71. This spring, the Supreme Court will review precisely the same standard that the *Cage* court elaborated here. See *Miscellaneous Orders of the Court*, *supra* note 2 (discussing certiorari in *United States v. Claiborne*).

72. *Cage*, 451 F.3d at 594.

73. *Id.* (emphasis added).

74. *Id.* (quoting *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (“[T]he farther the judge’s sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed.”)).

75. *Id.* (quoting *United States v. Kendall*, 446 F.3d 782 (8th Cir. 2006)). *Cage* emphasized that departures above the Guidelines as well as those below are subject to the same appellate scrutiny. *Id.* at 595 n.5.

76. *Id.* at 594.

77. *Kristl*, 437 F.3d at 1054–55.

78. Subsequent Tenth Circuit cases have described proportionality in terms of degrees of scrutiny. See, e.g., *United States v. Bishop*, 469 F.3d 896, 907 (10th Cir. 2006) (“[T]he extremity of the variance between the actual sentence imposed and the applicable Guidelines range should determine the amount of scrutiny we give to the district court’s substantive sentence.”).

C. Justifications for Booker Minimalism

Although the Guidelines are only one of the § 3553(a) sentencing factors, the Tenth Circuit has justified giving them special weight in appellate review for three reasons.

First, the court has said that the Guidelines are the one § 3553(a) factor that accounts for the other § 3553(a) factors.⁷⁹ The Guidelines are “the expert attempt” of the United States Sentencing Commission (“USSC”) to “weigh [the § 3553(a) sentencing] factors in a variety of situations.”⁸⁰ As such, they “are generally an accurate application of [these] factors”⁸¹ and merit special weight.⁸²

Second, the court has said that in directing the USSC to promulgate Guidelines, Congress intended that sentencing discretion “be limited by the decisions of a publicly accountable body.”⁸³ The Guidelines are therefore unique among the § 3553(a) factors because they are “an expression of popular political will about sentencing.”⁸⁴ Furthermore, in saving the Guidelines by making them advisory, *Booker* “refus[ed] to use the Sixth Amendment to nullify the entirety of Congress’s purpose” in establishing a responsive, democratic influence over sentencing.⁸⁵ Because that influence is represented in the Guidelines, they should continue to have a special place in appellate review.

Third, the court has asserted that *Booker* minimalism is important in preventing “vastly divergent sentences” among those committing similar crimes and having similar backgrounds.⁸⁶ The court has emphasized that Congress’s intent in passing the 1984 Sentencing Act was promoting sentencing uniformity.⁸⁷ Because the Guidelines are the only sentencing

79. *Cage*, 451 F.3d at 594 (citing *Terrell*, 445 F.3d at 1265); see also *Kristl*, 437 F.3d at 1054 (citing *United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005)). The *Kristl* court quoted *Mykytiuk*’s argument that Guidelines informed the other § 3553(a) factors, but did not explicitly endorse this rationale itself, choosing instead to focus on the sentencing goal of uniformity. *Id.*

80. *Terrell*, 445 F.3d at 1265.

81. *Cage*, 451 F.3d at 594 (quoting *Terrell*, 445 F.3d at 1265).

82. *Id.* at 593. (“It would be startling to discover that while Congress had created an expert agency, approved the agency’s members, directed the agency to promulgate Guidelines . . . and adjusted those Guidelines over a period of fifteen years, that the resulting Guidelines did not well serve” the § 3553(a)(2) purposes of sentencing. (quoting *United States v. Wilson*, 350 F. Supp. 2d 910, 915 (D. Utah 2005))).

83. *Cage*, 451 F.3d at 593.

84. *Id.*

85. *Id.*

86. *Kristl*, 437 F.3d at 1054 (quoting *Gonzalez-Huerta*, 403 F.3d at 738).

87. *Cage*, 451 F.3d at 593 (“The . . . approach, which we now adopt . . . make[s] the guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines to achieve.” (quoting *United States v. Booker*, 543 U.S. 220, 246 (2005))).

factor that provide a “uniform measure” in sentencing, they deserve special weight among the § 3553(a) factors.⁸⁸

D. Procedural Reasonableness as a Check on Booker Minimalism

While the Guidelines may have a special weight in the Tenth Circuit, deference to them is not absolute.⁸⁹ One important limitation comes in the distinction of procedural from substantive reasonableness.⁹⁰ The requirement that sentences be procedurally reasonable ensures that the Guidelines are not the only relevant § 3553(a) factor used in sentencing.⁹¹

Procedural reasonableness requires, among other things, that a district court consider a nonfrivolous argument based on § 3553(a) for a non-guideline sentence.⁹² In *United States v. Sanchez-Juarez*,⁹³ the Tenth Circuit vacated a sentence because the district court had apparently failed to consider such an argument.⁹⁴ In that case, the defendant disputed a 16-level offense conduct increase in United States Sentencing Guideline (“USSG”) § 2L1.2.⁹⁵ The defendant argued that the increase was improper because it inaccurately accounted for a previous conviction.⁹⁶ At sentencing, the district court noted that it “[had] considered the sentencing guidelines” but did not specifically address the argument

88. See *Wilson*, 350 F. Supp. 2d at 924 (“The only way of avoiding gross disparities in sentencing from judge-to judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines.”).

89. The court has emphasized that the Guidelines cannot be “conclusively” reasonable because this would violate *Booker*’s holding that the Guidelines are advisory. *Kristl*, 437 F.3d at 1054; see also *Booker*, 543 U.S. at 245.

90. *Kristl*, 437 F.3d at 1055; *Cage*, 451 F.3d at 591. Other circuits have also made this distinction. See Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 143 (2006), <http://www.thepocketpart.org/2006/07/berman.html>; D’Addio, *supra* note 12, at 177, 179; see also *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005) (noting that reasonableness review “is not limited to consideration of the length of the sentence,” but encompasses procedural considerations as well); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006) (“Reasonableness review involves both procedural and substantive components.”); *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005) (arguing that appellate courts must consider “not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination”); *United States v. Paladino*, 401 F.3d 471, 488 (7th Cir. 2005) (“[R]easonableness depends not only on the length of the sentence but on the process by which it is imposed.”).

91. See *Sanchez-Juarez*, 446 F.3d at 1117; *United States v. Cunningham*, 429 F.3d 673, 675–76 (7th Cir. 2005). Part IV examines why this distinction is important in this spring’s Supreme Court case reviewing presumptive reasonableness.

92. *Sanchez-Juarez*, 446 F.3d at 1117; cf. *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006) (“[A] rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises a ground of recognized legal merit (provided it has a factual basis) and the court fails to address it.” (citation and quotation marks omitted)); *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir. 2006) (“Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant’s argument and that the judge explained the basis for rejecting it.”).

93. 446 F.3d 1109 (10th Cir. 2006).

94. *Sanchez-Juarez*, 446 F.3d at 1118.

95. *Id.* at 1117. USSG § 2L1.2 is an offense conduct section in the Sentencing Guidelines Manual relating to unlawful entry or stay in the United States. USSG, *supra* note 1, § 2L1.2.

96. *Sanchez-Juarez*, 446 F.3d at 1117.

about USSG § 2L1.2.⁹⁷ The *Sanchez-Juarez* court held that this was procedurally unreasonable:

[W]here a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that “the sentencing judge [did] not rest on the guidelines alone, but . . . consider[ed] whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors.”⁹⁸

Under the rule in *Sanchez-Juarez*, an unexplained guideline sentence will not substitute for the § 3553(a) analysis procedural reasonableness requires whenever a party makes a nonfrivolous argument about one of the § 3553(a) factors.⁹⁹

The presumption of reasonableness for guideline sentences, therefore, does *not* apply to the procedural component of a sentence.¹⁰⁰ Instead, it applies only to the sentence’s substantive (length) component.¹⁰¹ This restriction on the scope of presumptive reasonableness is an important limitation on *Booker* minimalism because it ensures that district courts consider all relevant § 3553(a) factors rather than just the Guidelines.¹⁰²

II. EVALUATING THE *BOOKER* MINIMALIST APPROACH

The Tenth Circuit’s approach to reasonableness review is problematic on two major grounds. The first is that *Booker* minimalism lacks support in the language of either *United States v. Booker*¹⁰³ or the sen-

97. *Id.* at 1112.

98. *Id.* at 1117 (quoting *Cunningham*, 429 F.3d at 676); cf. *Crosby*, 397 F.3d at 115 (“[A] sentencing judge would commit a statutory error in violation of section 3553(a) if the judge failed to ‘consider’ the applicable Guidelines range (or arguably applicable ranges) as well as the other factors listed in section 3553(a) . . .”).

99. *Sanchez-Juarez*, 446 F.3d at 1117; cf. *Richardson*, 437 F.3d at 554 (“Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant’s argument and that the judge explained the basis for rejecting it.”); *Cunningham*, 429 F.3d at 675-76 (“[T]he sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors.”).

100. See *Sanchez-Juarez*, 446 F.3d at 1117; see also *Kristl*, 437 F.3d at 1054 (noting a *de novo* review for claims that “consider[] the district court’s application” of the Guidelines or the other § 3553(a) factors).

101. See discussion *infra* Part IV.B.1.

102. Note, however, that a party must argue the nonfrivolous § 3553(a) factor(s) at sentencing. A failure to do so may mean that a district court’s guideline sentence will be upheld even if the court failed to make a formal § 3553(a) analysis. See *United States v. Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006) (“We do not require a ritualistic incantation to establish consideration of a legal issue, nor do we demand that the district court recite any magic words to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider.” (quoting *United States v. Kelley*, 359 F.3d 1302, 1305 (10th Cir. 2004))); see also *United States v. Martinez*, 455 F.3d 1127, 1132 (10th Cir. 2006) (holding that a sentencing court need not “consider individually each factor listed in § 3553(a) before issuing a sentence”); *United States v. Paredes*, 461 F.3d 1190, 1194 (10th Cir. 2006).

103. 543 U.S. 220 (2005).

tencing statute. The second is that the court's *Booker* minimalism has not accounted for the parsimony provision in § 3553(a), which requires that every sentence be the lowest necessary to achieve a number of sentencing goals.

The justifications the court has offered for its approach only partially address these problems. That the Guidelines reflect the § 3553(a) factors and represent a democratic influence in sentencing are justifications that inaccurately account for the nature of the Guidelines. The court's assertion that *Booker* minimalism promotes sentencing uniformity, however, represents a stronger (albeit imperfect) justification for a guideline-centric approach.

A. Lack of Textual Support for *Booker* Minimalism

When *Booker* excised the mandatory sentencing provision from the sentencing statute,¹⁰⁴ it left the Guidelines as only one of several § 3553(a) sentencing factors.¹⁰⁵ The Tenth Circuit nevertheless continued to view the Guidelines as "not just one factor among many."¹⁰⁶ Part I showed that the Guidelines retained a disproportionate weight in appellate review compared to the other § 3553(a) factors.¹⁰⁷

The *Booker* opinion provides little textual support for *Booker* minimalism.¹⁰⁸ One could argue that it hinted at the approach when it instructed courts to "consider Guidelines ranges" and to "*tailor the sentence in light of other* [§ 3553(a)] statutory concerns."¹⁰⁹ This could be construed as instructing courts to give the Guidelines a prominent weight. *Booker* minimalism does require that courts "consider" the Guidelines as a starting point before "tailoring" them with the other § 3553(a) factors.¹¹⁰ One problem with this interpretation is that it rests on a single ambiguous phrase from the opinion. Moreover, interpreting it this way appears to conflict with other parts of *Booker* that do not indicate that any one factor has special weight.¹¹¹ For example, another part of the same opinion observes that without the mandatory provision, the

104. 18 U.S.C. § 3553(b)(1) (2000).

105. *Booker*, 543 U.S. at 264.

106. *United States v. Cage*, 451 F.3d 585, 593 (10th Cir. 2006).

107. See discussion *supra* Part I.A–B.

108. See, e.g., Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 FED SENT. R. 170 (2006) (noting that the Supreme Court's remedial opinion in *Booker* "appears to specifically contemplate a reasonableness review unfettered by" *Booker* minimalism and appellate review approaches such as presumptive reasonableness for guideline sentences).

109. *Booker*, 543 U.S. at 245–46 (emphasis added).

110. See *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006) ("The Guidelines continue to be the 'starting point' for district courts and for this court's reasonableness review on appeal."); *Cage*, 451 F.3d at 592 (quoting *Booker*, 543 U.S. at 245–46); *United States v. Andrews*, 447 F.3d 806, 812 (10th Cir. 2006).

111. See, e.g., *Booker*, 543 U.S. at 261 ("Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.").

sentencing statute requires judges to “take account of the Guidelines *together with other sentencing goals*.”¹¹²

Nor does *Booker* minimalism follow from a plain reading of § 3553(a).¹¹³ The statute lists the Guidelines as the fourth of seven primary factors that a district court must consider when imposing a sentence.¹¹⁴ It does not indicate a hierarchy among these factors¹¹⁵ or a preference for any.¹¹⁶ Along with *Booker*’s silence about a minimalist approach, the sentencing statute’s plain language provides critics with a strong argument against *Booker* minimalism.¹¹⁷

B. Lack of Consideration of the “Parsimony Provision”

Another problem with the Tenth Circuit’s *Booker* minimalism is that it has generally failed to address the “parsimony provision” in § 3553(a). The provision directs district courts to “impose a sentence sufficient, *but not greater than necessary*”¹¹⁸ to further policy goals in § 3553(a)(2).¹¹⁹ These goals include the need for a sentence to reflect the seriousness of the crime, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment.¹²⁰ The Tenth Circuit has inadequately explored how its approach relates to the parsimony provision’s requirement that sentences be the lowest necessary to achieve these sentencing goals.¹²¹

At times the court has appeared to confuse its appellate review for reasonableness with a district court’s obligation to impose a “sufficient, but not greater than necessary” sentence. In *United States v. Terrell*,¹²² the court held that “just as we presume on appeal that a sentence within the applicable guideline range is reasonable, so are district courts free to

112. *Id.* at 259 (emphasis added).

113. 18 U.S.C. § 3553(a) (2000). The statute is reprinted *supra* note 9.

114. *Id.* § 3553(a)(4).

115. *Id.* § 3553(a); see also *Booker*, 543 U.S. at 304–05 (Scalia, J., dissenting in part) (noting that the sentencing statute “provides no order of priority among all [the § 3553(a)] factors”).

116. See Berman, *supra* note 90, at 143 (“Congress’s nuanced sentencing instructions in § 3553(a) provide no textual basis for appellate courts to presume that all Guideline sentences are reasonable.”).

117. See *id.* at 142–44; Lamparello, *supra* note 12, at 174; Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, YALE L.J. POCKET PART, 137, 140 (2006), <http://www.thepocketpart.org/2006/07/gertner.html>.

118. § 3553(a) (emphasis added).

119. *Id.* § 3553(a)(2).

120. *Id.* In their entirety, the section’s policy provisions detail the need for a sentence imposed:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant;
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

Id.

121. *Id.* § 3553(a).

122. 445 F.3d 1261 (10th Cir. 2006).

make the same presumption"¹²³ *Booker*, however, discussed reasonableness in the context of appellate review of sentences, not in the district courts' imposition of those sentences.¹²⁴ Reasonableness, and by extension the presumption of reasonableness, are *appellate* rather than sentencing devices.¹²⁵ A district court's responsibility under § 3553(a) is not to impose a "reasonable" sentence, but to impose the lowest sentence necessary to achieve the policy objectives in § 3553(a)(2).¹²⁶ Reasonableness is the standard by which the appellate court "judg[es] whether a district court has accomplished [that] task."¹²⁷

The problem with the Tenth Circuit's confusion of the district and appellate court roles is that it incorrectly tells district courts that a sentence need only be "reasonable" rather than "sufficient, but not greater than necessary." Shifting the district courts' focus to reasonableness can lead to sentences that withstand appellate review for reasonableness but nevertheless violate § 3553(a) because they are longer than necessary. This problem is illustrated in *United States v. Begay*,¹²⁸ where the Tenth Circuit noted that a district court "may impose a non-Guidelines sentence if the sentencing factors set forth in § 3553(a) warrant it, even if a Guidelines sentence might also be reasonable."¹²⁹ Under § 3553(a)'s parsimony provision, however, the district court *must* impose the lower sentence.¹³⁰ The sentencing statute does not allow the district court to choose a sentence from within a range of reasonable sentences; rather, it requires a specific sentence. That specific sentence is the one "sufficient, but not greater than necessary," to meet the goals of the sentencing statute. The Tenth Circuit has therefore improperly extended the concept of reasonableness from the appellate level to the district court level.

Conflicts between *Booker* minimalism and the parsimony provision are likely to occur whenever there are circumstances unaccounted for by the Guidelines¹³¹ but properly considered under other § 3553(a) fac-

123. *Terrell*, 445 F.3d at 1265 (emphasis added).

124. *Booker*, 543 U.S. at 260–61.

125. *United States v. Buchanan*, 449 F.3d 731, 740 (6th Cir. 2006) (Sutton, J., concurring); *see also* *United States v. Foreman*, 436 F.3d 638, 644 n.1 (6th Cir. 2006) ("[A] district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)(2).").

126. § 3553(a); *see also* *United States v. Demaree*, 459 F.3d 791, 794–95 (7th Cir. 2006) ("The [sentencing] judge is not required—or indeed permitted—to 'presume' that a sentence within the guidelines range is the correct sentence All he has to do is consider the guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. § 3553(a)." (internal citations omitted)).

127. *Buchanan*, 449 F.3d at 740 (Sutton, J., concurring) (quoting *Foreman*, 436 F.3d at 644 n.1).

128. 470 F.3d 964 (10th Cir. 2006).

129. *Begay*, 470 F.3d at 975–76 (emphasis added).

130. *See* *United States v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir. 2006) ("[I]f a district court were explicitly to conclude that two sentences equally served the statutory purpose of § 3553, it could not, consistent with the parsimony clause, impose the higher.").

131. The Guidelines acknowledge that they fail to account for a number of possibly mitigating "offender characteristics" that are properly considered under § 3553(a), such as a defendant's age,

tors.¹³² The court has held that the Guidelines are “not just one factor among many,”¹³³ and that they have a “heavy weight” in sentencing and in appellate review.¹³⁴ Yet it is unclear how or even whether the Guidelines account for a district court’s primary § 3553(a) responsibility of imposing a “sufficient, but not greater than necessary” sentence.¹³⁵ When there are mitigating circumstances present for which the Guidelines do not account, the “heavy weight” given to Guidelines may therefore result in a district court wrongly giving a sentence that is greater than necessary.

The Tenth Circuit has also apparently failed to explore how the parsimony provision specifically bears on its appellate review for reasonableness. A search of reported Tenth Circuit cases following *Booker* shows that the court has rarely referenced the parsimony provision, except when reprinting it as part of § 3553(a).¹³⁶ Only in *United States v. Cage*¹³⁷ did the court discuss the parsimony provision as part of a district court’s sentencing responsibility.¹³⁸ Even then, though, the reference was in passing and did not explore how the provision might relate to the Guidelines.¹³⁹ Not knowing how the Guidelines relate to the parsimony provision but nevertheless giving the Guidelines “heavy weight” impairs the appellate court’s judgment about the reasonableness or unreasonableness of a district court’s determination that a particular sentence was “sufficient, but not greater than necessary.”

This apparent failure to explore the relationship between the Guidelines and the parsimony provision is a result of the Tenth Circuit’s *Booker* minimalist approach. By endorsing presumptive reasonableness and proportionality, the Tenth Circuit gave the Guidelines an important weight in determining the reasonableness (or unreasonableness) of district court sentences.¹⁴⁰ Yet it appears that in some instances the approach may incorrectly associate reasonableness with the guideline

educational skills, mental or physical condition, or family ties. See USSG, *supra* note 1, § 5H1.1–1.6; see also discussion *infra* Part II.C.1.

132. A number of the § 3553(a) sentencing factors permit broad inquiry into the defendant’s characteristics. See, e.g., § 3553(a)(1) (instructing the district court to consider “the history and characteristics of the defendant” when sentencing that defendant).

133. *Cage*, 451 F.3d at 593.

134. *Terrell*, 445 F.3d at 1264.

135. The USSC has also not addressed this issue. See Berman, *supra* note 90, at 143 (“The central command of § 3553(a) directs sentencing courts to ‘impose a sentence sufficient, but not greater than necessary, to comply with the purposes’ of punishment The U.S. Sentencing Commission has never fully explored—nor even formally addressed—whether the Guidelines serve this mandate.”).

136. See, e.g., *United States v. Clark*, 415 F.3d 1234, 1249 n.3 (10th Cir. 2005); *United States v. Resendiz-Patino*, 420 F.3d 1177, 1184 n.6 (10th Cir. 2005); *United States v. Valtierra-Rojas*, 468 F.3d 1235, 1238 n.5 (10th Cir. 2006).

137. 451 F.3d 585 (10th Cir. 2006).

138. *Cage*, 451 F.3d at 588.

139. *Id.*

140. See, e.g., *Kristl*, 437 F.3d at 1055; *Cage*, 451 F.3d at 593.

range, possibly pushing district courts to impose sentences longer than necessary.

C. *Evaluating the Tenth Circuit's Justifications for Booker Minimalism*

The justifications that the court has offered for its *Booker* minimalism address the problems outlined above to varying degrees. As discussed previously, the Tenth Circuit has asserted that the Guidelines: (1) reflect the other § 3553(a) factors,¹⁴¹ (2) reflect a democratic influence in sentencing,¹⁴² and (3) promote sentencing uniformity.¹⁴³ Implicit in these justifications is that while *Booker* and § 3553(a) may not explicitly endorse *Booker* minimalism, the Guidelines nevertheless have a unique status among the § 3553(a) factors that justifies giving them special weight.

1. The Guidelines Reflect the § 3553(a) Factors

The Tenth Circuit has asserted that the Guidelines are “generally an accurate application of the factors listed in § 3553(a).”¹⁴⁴ The Guidelines are the product of “careful consideration” by an expert body—the USSC—weighing and applying the sentencing factors “in a variety of situations.”¹⁴⁵ As such, the court has said, they merit special weight in appellate review for reasonableness.¹⁴⁶

When sentencing a defendant, a district court takes into account two types of considerations: “offense conduct” and “offender characteristics.”¹⁴⁷ Offense conduct relates to a defendant’s actions on a particular occasion: the type of crime committed, the harm that occurred, the weapon used, the size of the financial loss, etc.¹⁴⁸ Offender characteristics relate to a defendant’s history or personal circumstances and can include criminal history, employment status, physical or mental condition, or family and community ties.¹⁴⁹

141. *Terrell*, 445 F.3d at 1265.

142. *Cage*, 451 F.3d at 593.

143. *Kristl*, 437 F.3d at 1054.

144. *Cage*, 451 F.3d at 594 (citing *Terrell*, 445 F.3d at 1265). This justification is not unique to the Tenth Circuit. See also *Buchanan*, 449 F.3d at 735 (Sutton, J., concurring) (“[T]he guidelines remain the one § 3553(a) factor that accounts for all § 3553(a) factors.”).

145. *Terrell*, 445 F.3d at 1265. The USSC also views the Guidelines as reflecting the other § 3553(a) factors. See Statement of the Honorable Ricardo H. Hinojosa (United States Sentencing Commission Chairman) before the House Subcommittee on Crime, Terrorism, and Homeland Security, February 10, 2005, at 4, available at <http://judiciary.house.gov/media/pdfs/hinojosa021005.pdf> (“[T]he factors the Sentencing Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts are required to consider pursuant to 18 U.S.C. § 3553(a) and the *Booker* decision.”).

146. *Cage*, 451 F.3d at 594.

147. Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 277 (2005).

148. *Id.*

149. *Id.*

The Guidelines tend to focus on offense conduct¹⁵⁰ while simultaneously restricting consideration of offender characteristics.¹⁵¹ Section 2 of the Guidelines, devoted entirely to offense conduct,¹⁵² requires district courts to determine how numerous aspects of offense conduct correspond to forty-three possible “offense levels.”¹⁵³ At the same time, the Guidelines indicate that a number of offender characteristics are “not ordinarily relevant” to a guideline range calculation.¹⁵⁴ These “not ordinarily relevant” characteristics include: age (§ 5H1.1); education and vocational skills (§ 5H1.2); mental and emotional conditions (§ 5H1.3); physical condition (§ 5H1.4); employment record (§ 5H1.5); family ties and responsibilities (§ 5H1.6); previous military, public, or charitable service (§ 5H1.11); and lack of guidance as a youth (§ 5H1.12).¹⁵⁵ Interestingly, the primary exception to the Guidelines’ general exclusion of offender characteristics is a defendant’s criminal history, an aggravating factor that when combined with the relevant offense level yields the guideline sentencing range.¹⁵⁶

While these offender characteristics may not be “ordinarily relevant” to a guideline range calculation, they are *always* relevant to a sentencing determination. The sentencing statute requires a district court to “consider . . . the history and characteristics of the defendant” when determining a sentence.¹⁵⁷ Yet as reviewed above, § 5H of the Guidelines declares that much of this history and many of these characteristics are “not ordinarily relevant” to a guideline calculation.¹⁵⁸

The Tenth Circuit’s assertion that the Guidelines reflect the other § 3553(a) factors is therefore problematic because the Guidelines specifically exclude many offender characteristics relevant to a § 3553(a) sentencing inquiry.¹⁵⁹ By extension, the court’s guideline-centric methods of reasonableness review (including the presumption of reasonableness and proportionality) are also problematic whenever there are offender characteristics unaccounted for by the Guidelines.¹⁶⁰

150. *Id.* at 282.

151. *See id.*; Bowman, *supra* note 12, at 1347.

152. USSG, *supra* note 1, § 2.

153. Berman, *supra* note 147, at 282.

154. USSG, *supra* note 1, § 5H (introductory commentary).

155. *Id.* § 5H1.1–1.12; *see also* United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005) (identifying these and other characteristics not taken into account by the Guidelines).

156. Bowman, *supra* note 12, at 1324; Berman, *supra* note 147, at 283.

157. § 3553(a)(1).

158. USSG, *supra* note 1, § 5H (introductory commentary).

159. *See* Jason Hernandez, *Presumptions of Reasonableness for Guideline Sentences After Booker*, 18 FED SENT. R. 252 (2006) (“[T]he section 3553(a) factors . . . tend to favor mitigating circumstances due to restrictions on mitigating factors found in the Guidelines.”).

160. *See* discussion *infra* Part V.A.

The Tenth Circuit has implicitly recognized that the Guidelines imperfectly reflect the other § 3553(a) factors.¹⁶¹ In *United States v. Cage*,¹⁶² for example, the district court justified a variance by citing a number of mitigating offender characteristics, including the defendant's educational level, work history, and extenuating family circumstances.¹⁶³ Section 5H of the Guidelines specifically excludes "education or vocational skills," "employment record," and "family ties and responsibilities" from the guideline calculation.¹⁶⁴ Yet § 3553(a)(1) *required* the district court to consider these circumstances when sentencing because they related to the defendant's "history" and "characteristics."¹⁶⁵ *Cage* recognized this, observing that although the district court erred in the weight it had given these factors, *that* they had been properly considered under § 3553(a) was "beyond doubt."¹⁶⁶ In another case, *United States v. Mares*,¹⁶⁷ the court noted that a defendant's health problems could be considered personal "history and characteristics" relevant under § 3553(a)(1).¹⁶⁸ The Guidelines, however, specifically exclude physical condition from the guideline calculation.¹⁶⁹

The court's assertion that the Guidelines accurately reflect the other § 3553(a) factors is therefore flawed. They may generally reflect the factors relating to *offense conduct*, but they specifically exclude numerous *offender characteristics* relevant under § 3553(a).¹⁷⁰

2. The Guidelines Reflect a Democratic Influence

The Tenth Circuit has also argued that the Guidelines are unique because they reflect a democratic influence in sentencing.¹⁷¹ According to the court, Congress directed the USSC to promulgate the Guidelines so that sentencing discretion would "be limited by the decisions of a publicly accountable body."¹⁷² Because the Guidelines represent this "expression of popular political will," they deserve a special place among the § 3553(a) factors.¹⁷³

161. Congress explicitly recognized this, having noted the need to "maintain[] sufficient flexibility to permit individualized sentences" whenever warranted "by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (2000).

162. 451 F.3d 585 (10th Cir. 2006). This case was discussed *supra* Part I.B.

163. *Cage*, 451 F.3d at 595.

164. USSG, *supra* note 1, § 5H1.2, § 5H1.5, § 5H1.6.

165. § 3553(a)(1) says that a sentencing court "shall consider" the "history and characteristics of a defendant" when imposing a sentence. § 3553(a)(1).

166. *Cage*, 451 F.3d at 595.

167. 441 F.3d 1152 (10th Cir. 2006).

168. *Mares*, 441 F.3d at 1161.

169. USSG, *supra* note 1, § 5H1.4.

170. *Berman*, *supra* note 147, at 282.

171. *Cage*, 451 F.3d at 593.

172. *Id.*

173. *Id.*

One problem with this justification is how it conceives of the USSC. The Commission was originally intended to be “a body of experts . . . insulat[ed] from the distorting pressures of politics” rather than a reflection of politics.¹⁷⁴ From this insulated position, the USSC was to fashion the Guidelines to meet the “purposes of sentencing as set forth in [§ 3553(a)(2).]”¹⁷⁵ The USSC has, however, come under the influence of “popular political will” in a way that some have argued is detrimental. Over the years, the “power to make and influence sentencing rules has migrated . . . from the U.S. Sentencing Commission . . . toward political actors in Congress and [the Department of Justice].”¹⁷⁶

The USSC’s ability to independently fashion the Guidelines in accordance with its Congressional mandate has therefore been weakened.¹⁷⁷ Furthermore, those external political forces tend to be “uniformly aligned in one direction—that of increasing penalties.”¹⁷⁸ In some cases this brings the political influences in conflict with the policy objectives in § 3553(a)(2), which require judges to adjust sentences in light of a defendant’s individual circumstances.¹⁷⁹

The court’s argument that the Guidelines deserve a special weight because they reflect a democratic influence in sentencing is therefore also problematic.

3. The Guidelines Promote Uniformity

Finally, the court has justified its *Booker* minimalism by arguing that the Guidelines promote sentencing uniformity.¹⁸⁰ Though imperfect, this justification does provide the court with a compelling basis for its guideline-centric approach.

The strength of the uniformity justification is in the origin of the sentencing statute and the Guidelines. After over a decade of debate about disparity in sentencing, Congress enacted the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984.¹⁸¹ The

174. Bowman, *supra* note 12, at 1324 (internal citations omitted).

175. § 991(b)(1)(A). These are the same purposes in sentencing that judges are required to consider when imposing a sentence—i.e., the need for the sentence to reflect the seriousness of the offense, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment. § 3553(a)(2).

176. Bowman, *supra* note 12, at 1319; see also Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 236 (2005); Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker: Why and How the Guidelines Do Not Comply With § 3553(a)*, 30 CHAMPION 32, 35-36 (2006) (noting, among other things, that the Department of Justice and other law enforcement agencies “are allowed to communicate with the [USSC] in secret”).

177. Bowman, *supra* note 12, at 1340-42 (discussing both the Justice Department’s “decreasing deference” to the USSC as well as Congressional usurpation of the USSC’s role).

178. *Id.* at 1345.

179. See § 3553(a)(2), reprinted *supra* note 9.

180. *Kristl*, 437 F.3d at 1054; *Cage*, 451 F.3d at 593.

181. UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2005) [hereinafter USSC OVERVIEW], available at

legislation established the USSC and charged it with promulgating the Federal Sentencing Guidelines.¹⁸² In doing so, Congress intended primarily to structure the previously “unfettered sentencing discretion accorded to federal trial judges” so as to achieve more uniformity and certainty in sentencing.¹⁸³ Congress specifically instructed the USSC to draft Guidelines to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”¹⁸⁴

Some have argued, however, that the inconspicuous placement of sentencing uniformity among the § 3553(a) factors¹⁸⁵ means that the Guidelines should be weighted as “only one of seven distinct sentencing considerations.”¹⁸⁶ The difficulty with this argument is that does not account for the primary historical motivation of the sentencing statute, which was promoting sentencing uniformity.¹⁸⁷ *Booker* itself explicitly acknowledged that “Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”¹⁸⁸ Indeed, the importance Congress placed on the Guidelines furthering uniformity was evidenced by the pre-*Booker* requirement that that judges impose guideline sentences in most circumstances.¹⁸⁹

The goal of uniformity cannot justify the types of Sixth Amendment violations that *Booker* prohibited.¹⁹⁰ Yet *Booker* was clear that “the application of a ‘reasonableness standard’ was intended to . . . [achieve] ‘honesty,’ ‘uniformity,’ and ‘proportionality’ in sentencing, and to help in avoiding ‘excessive sentencing disparities.’”¹⁹¹ The Guidelines are uniquely capable of promoting these goals.¹⁹² Even critics of *Booker* minimalism acknowledge that the Guidelines “can help frame, inform,

http://www.ussc.gov/general/USSCoverview_2005.pdf. For a more detailed review of how the Federal Sentencing Guidelines came to be enacted, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

182. USSC OVERVIEW, *supra* note 181, at 1.

183. *Id.* at 1–2; see also Bowman, *supra* note 12, at 1324 (indicating that one of Congress’s intentions in creating the USSC was drafting a “rationalized federal criminal code”). One prominent proponent of the Sentencing Reform Act was federal judge Marvin Frankel, who had described the prior discretionary sentencing system as being “at war with such concepts . . . as equality, objectivity, and consistency in the law.” MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 10 (1973).

184. § 991(b)(1)(B).

185. § 3553 (a)(6).

186. Berman, *supra* note 17, at 421–22.

187. See *supra* note 184.

188. *Booker*, 543 U.S. at 253.

189. 18 U.S.C. 3553(b)(1) (2000). *Booker* excised this provision. 543 U.S. at 245.

190. See *Booker*, 543 U.S. at 263 (“We cannot and do not claim that use of a ‘reasonableness’ standard will provide the uniformity that Congress originally sought to secure.”).

191. *United States v. Maloney*, 466 F.3d 663, 668 (8th Cir. 2006) (citing *Booker*, 543 U.S. at 264); see also Bowman, *supra* note 12, at 1322 (outlining Congress’s motivations in reforming the sentencing system).

192. *Maloney*, 466 F.3d at 668 (noting that the Guidelines serve as “a benchmark” in reasonableness review). See discussion *infra* Part IV.A.

and regularize the exercise of reasoned judgment by different sentencing judges.”¹⁹³ The numerous considerations, tables, and calculations provide an important means of achieving the sentencing uniformity that Congress envisioned.¹⁹⁴

The Guidelines thus provide a mechanism for achieving uniformity. The mechanism, though, may not always be perfect.¹⁹⁵ As detailed above, in many instances a guideline range will fail to reflect important offender characteristics.¹⁹⁶ Yet by providing a calculated and uniform numerical measure in the guideline ranges, the Guidelines have an important role in furthering Congress’s original goals. This important role justifies a prominent place for the Guidelines in appellate review.

Part V presents a standard of reasonableness review that accounts for the strength of the Guidelines as well as their weaknesses.

III. BOOKER MINIMALISM IN THE OTHER CIRCUITS

Guideline-centric *Booker* minimalism likely originated in the Tenth Circuit. The day after the Supreme Court handed down *United States v. Booker*,¹⁹⁷ a United States District Court Judge in Utah, Paul Cassell, articulated a strong argument for *Booker* minimalism.¹⁹⁸ The need for sentencing uniformity justified giving the Guidelines heavy weight, Judge Cassell argued, and variances should occur only “in unusual cases for clearly identified and persuasive reasons.”¹⁹⁹ This *Booker* minimalism viewed *Booker* as having made only a “modest adjustment” to the Guidelines’ role.²⁰⁰ While no longer mandatory, the Guidelines would nevertheless continue to have a disproportionate weight in sentencing.²⁰¹

193. Berman, *supra* note 90, at 144.

194. See *United States v. Wilson*, 350 F. Supp. 2d 910, 924 (D. Utah 2005) (“The only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform measure in all cases. The only standard currently available is the Sentencing Guidelines.”); see also *Buchanan*, 449 F.3d at 738 (Sutton, J., concurring) (“Where else, at any rate, would a court of appeals start in measuring the reasonableness of a sentence?”); *United States v. Jimenez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc) (“To construct a reasonable sentence starting from scratch in every case would defeat any chance at rough equality which remains a congressional objective.”).

195. Some have questioned how effective the Guidelines are at achieving uniformity. See generally Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2006).

196. See discussion *supra* Part II.C.1.

197. 543 U.S. 220 (2005).

198. *United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005). See DEMLEITNER ET AL., *supra* note 18, at 56 (“Leading sentencing judges were quick to see the importance of illuminating the relevance of the guidelines in a post-*Booker* world. Within 24 hours of the *Booker* ruling, U.S. District Judge Paul Cassell . . . had issued a long opinion on exactly this point.”). The Tenth Circuit endorsed *Wilson* and has incorporated it into its argument for *Booker* minimalism. See *United States v. Cage*, 451 F.3d 585, 593 (10th Cir. 2006).

199. *Wilson*, 350 F. Supp. 2d at 912.

200. McConnell, *supra* note 15, at 666–67.

201. *Id.* at 667; *Wilson*, 350 F. Supp. 2d at 912.

Booker minimalism was not universal, though, and a number of other district courts quickly rejected it.²⁰² In doing so, they argued that *Booker* significantly changed the role of the Guidelines and had dramatically increased judges' sentencing discretion.²⁰³ Under this *Booker* maximalist approach, the Guidelines were "just one of a number of sentencing factors."²⁰⁴

By the summer of 2005, *Booker* minimalism had moved to the appellate level as several circuits held that guideline sentences were presumptively reasonable on appeal.²⁰⁵ Some circuits declined to endorse this presumption out of concern that it might conflict with the § 3553(a) sentencing analysis that *Booker* mandated.²⁰⁶ Other differences among the circuits arose as some adopted proportionality when reviewing non-guideline sentences, holding that "the farther the judge's sentence departs from the guidelines . . . the more compelling the justification based on factors in section 3553(a)" must be.²⁰⁷

At first, these circuit splits appeared to highlight very different approaches to reasonableness review.²⁰⁸ However, an examination of the relevant case law in the two years since *Booker* reveals that these differences among the circuits tended to be more superficial than substantive.²⁰⁹ *Booker* maximalism did not move to the appellate level as *Booker* minimalism had. Indeed, *all* of the circuits eventually adopted a *Booker* minimalist approach to reasonableness review that gave the Guidelines special weight among the § 3553(a) factors.²¹⁰ Whether a circuit adopted presumptive reasonableness or proportionality was therefore less significant than might otherwise seem since the Guidelines remained prominent in appellate review.²¹¹

202. See, e.g., *United States v. Ranum*, 353 F. Supp. 2d 984, 985–86 (E.D. Wis. 2005); *Simon v. United States*, 361 F. Supp. 2d 35, 40 (D.N.Y. 2005).

203. McConnell, *supra* note 15, at 666 (describing how, under *Booker* maximalism, "district courts are liberated to sentence criminal defendants in accordance with the judge's sense of individualized justice, with the Guidelines merely taken into 'consideration' for what they are worth").

204. *Ranum*, 353 F. Supp. 2d at 985; see also *Simon*, 361 F. Supp. 2d at 40.

205. Sady, *supra* note 108, at 170 (citing *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) and *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) as among the first cases endorsing presumptive reasonableness).

206. See, e.g., *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); see also *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005).

207. *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); cf. *United States v. Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006) ("[W]e note that several other circuits have endorsed a rule that requires district courts to offer a more compelling accounting the farther a sentence deviates from the advisory Guidelines range . . . [W]e have yet to adopt this standard as a rule in this circuit, and do not do so here.").

208. See, e.g., DEMLEITNER ET AL., *supra* note 18, at 65.

209. See discussion *infra* Part III.A–C. Note that while circuit courts may have adopted *Booker* minimalism, not all district courts have done so. Some weigh the Guidelines the same as any other § 3553(a) factor. See, e.g., *Ranum*, 353 F. Supp. 2d at 986; *Simon*, 361 F. Supp. 2d at 40.

210. See discussion *infra* Part III.A–C.

211. Part IV explores how this relates to the particular issues that the Supreme Court will consider this spring.

A. Reasonableness Review and the Presumption of Reasonableness

The clearest indicator of a court's *Booker* minimalist approach to appellate review is its presumption of reasonableness for guideline sentences.²¹² The Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits all endorse this presumption of reasonableness.²¹³ In these circuits, a party challenging a guideline sentence must rebut the presumption of reasonableness in light of other § 3553(a) factors.²¹⁴ While the presumption can function differently among these circuits,²¹⁵ in all of them the presumption gives the Guidelines a disproportionate weight compared to the other sentencing factors.²¹⁶

Five of the circuit courts—the First, Second, Third, Ninth, and Eleventh—have declined to adopt this presumption of reasonableness for guideline sentences, finding it “[un]helpful to talk about the guidelines as ‘presumptively’ controlling.”²¹⁷ Though they formally reject the presumption, these courts tend to exhibit the same type of guideline-centric *Booker* minimalism as those circuits that endorse it. For example, in all circuits the Guidelines are the threshold consideration in sentencing as well as in appellate review for reasonableness.²¹⁸ Furthermore, the circuits declining to endorse presumptive reasonableness nevertheless tend to equate reasonableness with the Guidelines. The Second Circuit has observed that “in the *overwhelming majority of cases*, a Guidelines sentence . . . would be reasonable in the particular circumstances.”²¹⁹ Simi-

212. See discussion *supra* Part I.A.

213. *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 555 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006).

214. See, e.g., *Alonzo*, 435 F.3d at 554; *Mykytiuk*, 415 F.3d at 608; *Kristl*, 437 F.3d at 1055.

215. See discussion about the different meanings of presumptive reasonableness *infra* Part IV.B.1.

216. See, e.g., *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *Cage*, 451 F.3d at 593.

217. *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006); 440 F.3d at 518; see also *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005); 397 F.3d at 115; *United States v. Cooper*, 437 F.3d 324, 329–30 (3d Cir. 2006); *United States v. Zavala*, 443 F.3d 1165, 1168–70 (9th Cir. 2006); *United States v. Talley*, 431 F.3d 784, 787 (11th Cir. 2005).

218. See, e.g., *Jimenez-Beltre*, 440 F.3d at 518 (“[T]he district court will have to calculate the applicable guidelines range . . . before deciding whether to exercise its . . . discretion to impose a non-guidelines sentence. (emphasis added)); *Cooper*, 437 F.3d at 331 (“[The Guidelines] provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct.”); *United States v. White*, 405 F.3d 208, 219 (4th Cir. 2005) (“[The] guideline range remains the starting point for the sentencing decision.”); *United States v. Vargas-Garcia*, 434 F.3d 345, 349 (5th Cir. 2005) (“[W]e must first consider the district court’s calculation of the Guidelines before turning to the broader reasonableness issues.”); *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) (explaining that the first step in a reasonableness review is determining whether the sentencing court correctly calculated the guideline range); *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006) (“The Guidelines continue to be the starting point . . . for this court’s reasonableness review on appeal.”); *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2005) (“First, the district court must consult the Guidelines and correctly calculate the range provided by the Guidelines.”).

219. *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (emphasis added).

larly, the Third Circuit has held that a guideline sentence is “more likely to be reasonable than one outside the guidelines range.”²²⁰ According to the Ninth Circuit, “it is very likely that a Guideline calculation will yield a site within the borders of reasonable sentencing territory.”²²¹ And the Eleventh Circuit has said that it would ordinarily “expect a sentence within the Guidelines range to be reasonable.”²²²

One prominent critic of *Booker* minimalism has argued that “nearly all circuit court decisions are focused excessively on the guidelines when judging reasonableness.”²²³ The special weight the circuits give the Guidelines in relation to the other § 3553(a) factors is also reflected in how they describe the Guidelines. For example, the First Circuit—which has rejected presumptive reasonableness—has held that “the Guidelines are more than just ‘another [§ 3553(a)] factor.’”²²⁴ The Second Circuit, another court rejecting presumptive reasonableness, describes the Guidelines as not “just ‘another factor’ in the statutory list.”²²⁵ This language is strikingly similar to that of the Tenth Circuit, which has adopted presumptive reasonableness and has described the Guidelines as “not just one factor among many.”²²⁶ In language and in use, therefore, all of the circuits implement the Guidelines in much the same way.

B. Non-Guideline Sentences: Proportionality and Unreasonableness

Examining how circuits review non-guideline sentences for reasonableness provides more evidence of the prominence of *Booker* minimalism. One method of reviewing these sentences is proportionality. Under proportionality, “the farther the judge’s sentence departs from the guidelines . . . the more compelling the justification based on factors in section 3553(a)” must be.²²⁷

Not surprisingly, all of the circuits that have adopted presumptive reasonableness for guideline sentences also evaluate non-guideline sentences using proportionality.²²⁸

220. *United States v. Lloyd*, 469 F.3d 319, 321–22 (3d Cir. 2006) (upholding a district court’s sentence when the sentencing judge indicated that “the guideline range is the thing that I should be looking to primarily”).

221. *Zavala*, 443 F.3d at 1170.

222. *Talley*, 431 F.3d at 787.

223. Sentencing Law and Policy Blog, <http://sentencing.typepad.com/> (Aug. 22, 2006, 8:57AM).

224. *Jimenez-Beltre*, 440 F.3d at 518. While the *Jimenez-Beltre* court justified its special reliance on the Guidelines as “the only integration of the multiple factors,” it emphasized that by themselves the Guidelines are inadequate. *Id.*

225. *Rattoballi*, 452 F.3d at 133.

226. *Cage*, 451 F.3d at 593.

227. *Dean*, 414 F.3d at 729.

228. *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Duhon*, 440 F.3d 711, 715 (5th Cir. 2006); *United States v. Davis*, 458 F.3d 491, 495–497 (6th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. Dalton*, 404 F.3d 1029, 1033 (8th Cir. 2005); *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006).

Significantly, two circuits that have formally rejected presumptive reasonableness have nevertheless adopted proportionality. The First Circuit has held that the farther a sentence varies from the guideline range, “the more compelling the justification based on factors in section 3553(a)” must be.²²⁹ The Eleventh Circuit has also held that “an extraordinary reduction” from the guideline range “must be supported by extraordinary circumstances.”²³⁰ More circuits have therefore adopted proportionality than have adopted presumptive reasonableness.

Only the Second, Third, and Ninth Circuits have declined to formally adopt either method of reasonableness review. However, even these circuits use the Guidelines in a similar way to those endorsing proportionality—i.e., as an important metric in evaluating the reasonableness of a non-guideline sentence. For example, in *United States v. Rattoballi*,²³¹ the Second Circuit expressly declined to adopt proportionality²³² but emphasized the special weight of the Guidelines and their role “in calibrating the review for reasonableness.”²³³ These circuits, like those that use proportionality, closely examine a district court’s variance from the Guidelines by evaluating the “statement of reasons (or lack thereof) for the sentence that it elect[ed] to impose.”²³⁴

The Guidelines thus have a central role in measuring reasonableness in virtually all appellate review of district court sentencing.

C. Booker Minimalism and Post-Booker Sentencing Statistics

The Guidelines’ place in appellate review among the circuits raises an important issue in light of *Booker*’s holding that mandatory Guidelines violate the Sixth Amendment.²³⁵ Per se unreasonableness for non-guideline sentences would be constitutionally problematic under *Booker*.²³⁶ Yet the circuits’ treatment of the Guidelines may render them outcome-determinative, an essentially mandatory regime indistinguishable from the one *Booker* struck down.

229. *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006) (citing the Seventh Circuit’s *Dean*, 414 F.3d at 729).

230. *United States v. Martin*, 455 F.3d 1227, 1236–37 (11th Cir. 2006) (citing *United States v. McVay*, 447 F.3d 1348, 1357 (11th Cir. 2006)).

231. 452 F.3d 127 (2d Cir. 2006).

232. *Rattoballi*, 452 F.3d at 134 (“[W]e have yet to adopt this [proportionality] standard as a rule in this circuit, and do not do so here.”).

233. *Id.* at 133; see also *United States v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir. 2006) (noting that the Guidelines are to be used as the “benchmark” when considering a sentence).

234. *Rattoballi*, 452 F.3d at 134; cf. *Mares*, 402 F.3d at 519 (“[W]hen the judge elects to give a non-Guideline sentence, she should carefully articulate the reasons she concludes that the sentence she has selected is appropriate for that defendant. These reasons should be fact specific . . .”).

235. *Booker*, 543 U.S. at 226–27.

236. *Id.* at 311 (Scalia, J., dissenting in part) (“[A]ny system which held it per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional.”).

One concern expressed about the presumption of reasonableness and proportionality is the message that they send to district courts. While § 3553(a) obligates district courts to impose a sentence “sufficient, but not greater than necessary,”²³⁷ these popular appellate methods of reasonableness review may have the effect of discouraging non-guideline sentences.²³⁸ As we have seen, however, even those circuits rejecting presumptive reasonableness or proportionality tend to focus their appellate review around the Guidelines. According to critics, the atmosphere of appellate review among every circuit “encourage[es] the sort of rote, mechanistic reliance on the Guidelines that [the *Booker* substantive] opinion found constitutionally problematic.”²³⁹

Sentencing statistics bolster arguments that *Booker* failed to “radically transform[] essential federal sentencing dynamics” and that “post-*Booker* sentencing may not be too different from pre-*Booker* sentencing.”²⁴⁰ In March 2006, the USSC issued a report about the impact of *Booker* on federal sentencing.²⁴¹ The report concluded that “*Booker* has not radically altered many central features of the federal sentencing system: Guideline calculations based on judicial fact-finding, and within-guideline sentencing outcomes, remain the norm.”²⁴² When guideline sentences were combined with below-range sentences sponsored by the Government, they equaled approximately 86 percent of all sentences.²⁴³ One particularly telling statistic is that since *Booker*, only one court has vacated a guideline sentence for substantive unreasonableness.²⁴⁴ The rarity of such a holding reflects the prominence of the Guidelines among circuit courts.

237. 18 U.S.C. § 3553(a) (2000).

238. *United States v. Buchanan*, 449 F.3d 731, 740 (6th Cir. 2006) (Sutton, J., concurring) (“If I have one anxiety about the presumption [of reasonableness], it is the risk that it will cast a discouraging shadow on trial judges who otherwise would grant variances in exercising their independent judgment.”).

239. Berman, *supra* note 90, at 143.

240. Douglas A. Berman, *Assessing Federal Sentencing After Booker*, 17 FED. SENT. R. 291, 291–92 (2005); *see also* Gertner, *supra* note 117, at 140 (noting the similarities between pre-*Booker* decisions and those in circuits that had adopted presumptive reasonableness); Frank O. Bowman, III, *‘Tis a Gift to be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT. R. 301 (2006) (“[T]he federal sentencing debate . . . since *Booker* has mostly been about whether the post-*Booker* guidelines are really any different from the pre-*Booker* guidelines.” (citation omitted)).

241. U.S. SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, March 2006, [hereinafter USSC FINAL REPORT], available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

242. Douglas A. Berman, *Now What? The Post-Booker Challenge for Congress and the Sentencing Commission*, 18 Fed. Sent. R. 157 (2006); *see also* USSC FINAL REPORT, *supra* note 241, at vi (“The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines.”).

243. USSC FINAL REPORT, *supra* note 241, at 46; *see also* Statement of the Honorable Ricardo H. Hinojosa before the House Subcommittee on Crime, Terrorism, and Homeland Security, March 16, 2006, at 6, available at http://www.ussc.gov/booker_report/03_16_06Booker%20Testimony.pdf. Note that there are greater variances among district courts than among the circuits themselves. *See* USSC FINAL REPORT, *supra* note 241, at 85–86.

244. *United States v. Lazenby*, 439 F. 3d 928, 934 (8th Cir. 2006).

A review of case law and sentencing statistics therefore reveals that *Booker* minimalism suffuses virtually all of appellate review.²⁴⁵ In every circuit, guideline sentences “are accorded a greater degree of deference, and engender far less scrutiny” than those outside of the Guidelines.²⁴⁶ Differences between the circuits that have adopted presumptive reasonableness or proportionality and those that have not tend to be superficial rather than substantive.

This case law and these statistics raise a question about what impact it would have if the Supreme Court declares this spring that presumptive reasonableness or proportionality are unconstitutional when even those circuits not adopting them embrace guideline-centric *Booker* minimalism.

IV. THE SUPREME COURT AND THE FUTURE OF *BOOKER* MINIMALISM

The Supreme Court will address the presumption of reasonableness and proportionality in two cases this spring. The cases have the potential to widely impact reasonableness review in the circuit courts. Whether they will have this impact, though, is uncertain.

A. Introduction: Rita, Claiborne, and the Tension and Competing Goals of Sentencing

Congress created the USSC and charged it with establishing policies in the federal sentencing system to address specific purposes.²⁴⁷ These included the need for a sentence to reflect the seriousness of the crime, to deter future criminal conduct, to protect the public from further crimes, and to provide defendants with needed treatment.²⁴⁸ Congress intended that the Guidelines would “provide certainty and fairness” in meeting these purposes, and that they would “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”²⁴⁹

Congress also recognized the limitations of a structured sentencing system. To meet its intended purposes, the system would also need to “maintain[] sufficient flexibility to permit individualized sentences” whenever warranted by circumstances unaccounted for by the Guidelines.²⁵⁰ Sentencing would also need to account for the parsimony provision at the heart of § 3553(a), which required district courts to impose the

245. See Eric Citron, *Sentencing Review: Judgement, Justice, and the Judiciary*, 115 YALE L.J. POCKET PART 150, 150 (2006), <http://www.thepocketpart.org/2006/07/citron.html> (noting that despite the fact some circuits have nominally rejected presumptive reasonableness for Guidelines sentences, “one can comb through mountains of case law from any circuit before finding a guideline sentence reversed as unreasonable”).

246. Lamparello, *supra* note 12, at 174.

247. 28 U.S.C. § 991(b)(1)(A) (2000).

248. *Id.* (referencing 18 U.S.C. § 3553(a)(2) (2000)).

249. § 991(b)(1)(B).

250. *Id.*

lowest sentence needed ("sufficient, but not greater than necessary") in each case.²⁵¹ Reaching this lowest sentence requires a district court to consider how each defendant's unique "history and characteristics" relate to the § 3553(a) sentencing factors.²⁵²

There is thus a tension in sentencing between the uniformity promoted by the Guidelines on one side, and the exercise of independent judicial discretion required by § 3553(a) and *Booker* on the other. The popularity of the presumption of reasonableness and proportionality among the circuit courts serves to highlight this tension.

The Supreme Court has chosen *United States v. Rita* and *United States v. Claiborne* as the vehicles for addressing the proper balance between the Guidelines and the other § 3553(a) sentencing factors.²⁵³ *Rita* asks whether *Booker* prohibits applying a presumption of reasonableness to guideline sentences, and *Claiborne* asks whether *Booker* prohibits proportionality as a method of evaluating non-guideline sentences.²⁵⁴

A closer examination of *Rita* and *Claiborne* raises questions about how they might impact *Booker* minimalism as it exists in the circuit courts. Part of the uncertainty stems from the unusual definition of presumptive reasonableness in *Rita*. Because the "presumption of reasonableness" in *Rita* functions differently than it does in most other circuits, the Supreme Court could issue a narrow ruling that would preserve the presumption as it exists in these other circuits.

Claiborne reflects a mainstream approach to proportionality, but it too leaves questions about its impact. Part III detailed how circuit courts have uniformly embraced *Booker* minimalism's guideline-centric approach. This is true even though only some have formally adopted proportionality. This raises the question of what impact it would have if the Court finds that proportionality violates *Booker*. How would this affect circuits that have not formally endorsed it as a method of reasonableness review but nevertheless employ a guideline-centric approach? A similar question arises with *Rita* and presumptive reasonableness—i.e., if the presumption is struck down, can courts nevertheless continue to give the Guidelines disproportionate weight among the sentencing factors?

It is unclear to what extent *Rita* and *Claiborne* will address these questions. The Supreme Court could choose to narrow the scope of its rulings to promote unanimity on what has been a contentious issue.²⁵⁵ A

251. § 3553(a).

252. *Id.* § 3553(a)(1).

253. *Miscellaneous Orders of the Court*, *supra* note 2.

254. *Id.*

255. Chief Justice John Roberts has emphasized the importance of the Court deciding issues on the "narrowest possible ground" so as to "promote[] clarity and guidance for . . . the lower courts." Chief Justice John Roberts, Commencement Address at the Georgetown University Law Center

narrow ruling, though, may portend an uncertain future for both *Booker* minimalism and reasonableness review.

B. *United States v. Rita* and the Presumption of Reasonableness

The impact of *Rita* will depend on whether the Supreme Court chooses to review the presumption of reasonableness as it relates only to the procedural component of a sentence, or if the Court chooses to review how it relates to the substantive component of a sentence as well. This is an important distinction because it marks the difference between an opinion that would have a broad effect and one that would have only a limited effect.

1. Two Different Approaches to the Presumption of Reasonableness

When reviewing district court sentences, the majority of circuits have divided reasonableness into procedural and substantive components.²⁵⁶ Procedural reasonableness asks whether the district court correctly calculated the applicable guideline range²⁵⁷ and whether it “considered the § 3553(a) factors and explained its reasoning” when imposing a particular sentence.²⁵⁸ Substantive reasonableness considers whether the length of the sentence was reasonable in light of the facts of the case and relevant § 3553(a) factors.²⁵⁹

(May 21, 2006). The contentiousness of the issue is apparent in the fact that both the substantive and remedial *Booker* opinions split 5–4. See McConnell, *supra* note 15, at 677–78.

256. Berman, *supra* note 90, at 143; D’Addio, *supra* note 12, at 177, 179; see also *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006) (“Reasonableness review involves both procedural and substantive components.”); *United States v. Webb*, 403 F.3d 373, 383 (6th Cir. 2005) (arguing that appellate courts must consider “not only the length of the sentence but also the factors evaluated and the procedures employed by the district court in reaching its sentencing determination”); *United States v. Paladino*, 401 F.3d 471, 488 (7th Cir. 2005) (“[R]easonableness depends not only on the length of the sentence but on the process by which it is imposed.”); *United States v. Shannon*, 414 F.3d 921, 923 (8th Cir. 2006) (discussing procedural and substantive errors in sentencing); *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006) (“[T]he reasonableness standard of review set forth in *Booker* necessarily encompasses both the reasonableness of the length of the sentence, as well as the *method* by which the sentence was calculated.”).

257. See, e.g., *Kristl*, 437 F.3d at 1055.

258. *United States v. Cage*, 451 F.3d 585, 591 (10th Cir. 2006) (internal quotation marks omitted) (citing *Kristl*, 437 F.3d at 1054–55); see also *United States v. Dexta*, 470 F.3d 612, 614–15 (6th Cir. 2006) (“[A] sentence is procedurally reasonable if the record demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion”). Circuits that have not adopted presumptive reasonableness have also recognized that reasonableness has a procedural component. See *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005) (“[A] sentencing judge would commit a statutory error in violation of section 3553(a) if the judge failed to ‘consider’ the applicable Guidelines range (or arguably applicable ranges) as well as the other factors listed in section 3553(a)”); *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2005) (“To determine if the court acted reasonably in imposing the resulting sentence, we must first be satisfied the court exercised its discretion by considering the relevant factors.”).

259. See, e.g., *United States v. Gale*, 468 F.3d 929, 934 (6th Cir. 2006) (noting the substantive component of reasonableness review relates to “the length of the sentence”) (internal citations and quotation marks omitted); *Paladino*, 401 F.3d at 488 (noting that one aspect of reasonableness is “the length of the sentence”); *United States v. Mateo*, 471 F.3d 1162, 1166 (10th Cir. 2006) (“We

As discussed in Part I, procedural reasonableness is a check on *Booker* minimalism because in theory it prohibits courts from relying solely on the Guidelines.²⁶⁰ An important part of procedural reasonableness is “ensur[ing] that a sentencing court explains its reasoning to a sufficient degree to allow for reasonable appellate review.”²⁶¹ Section 3553(c) of the sentencing statute requires a district court “at the time of sentencing” to “state in open court the reasons for the imposition of the particular sentence.”²⁶² The district court must therefore show that it accounted for not only the Guidelines, but any other relevant § 3553(a) factors raised by a defendant or by the government.²⁶³ A district court’s failure to address a nonfrivolous § 3553(a) argument renders the sentence procedurally unreasonable and it should be vacated.²⁶⁴

In most circuits, the presumption of reasonableness does *not* attach to the procedural component of a district court’s sentence, even if that sentence falls within the Guidelines.²⁶⁵ In fact, claims of procedural un-

determine substantive reasonableness by reference to the actual length of the sentence imposed in relation to the sentencing factors enumerated in § 3553(a).”).

260. See discussion *supra* Part I.D.

261. *Dexta*, 470 F.3d at 614.

262. 18 U.S.C. § 3553(c) (2000).

263. See, e.g., *United States v. Cunningham*, 429 F.3d 673, 676 (7th Cir. 2005) (“[T]he sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors.”); Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 146 (2006) <http://www.thepocketpart.org/2006/07/chanenson.html> (“[T]he sentencing judge must explain his reasons, and meaningfully document how he grappled with the § 3553(a) factors to reach the sentence imposed.”).

264. Chanenson, *supra* note 263, at 148 (“[A] number of appellate panels have enforced the statutory reasons requirement and reversed in cases in which the judge failed to provide a sufficient explanation of the logic behind the sentence.”); see also *Moreland*, 437 F.3d at 434 (holding that a district court’s sentence “may be procedurally unreasonable . . . if the district court provides an inadequate statement of reasons [under § 3553(a)]”); *United States v. Richardson*, 437 F.3d 550, 554 (6th Cir. 2006) (“Where a defendant raises a particular argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant’s argument and that the judge explained the basis for rejecting it.”); *Cunningham*, 429 F.3d at 676 (“[T]he sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors.”); *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1117 (10th Cir. 2006) (“[W]here a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence . . . we must be able to discern from the record that the sentencing judge [did] not rest on the guidelines alone.” (citation and internal quotation marks omitted)). Circuits rejecting presumptive reasonableness have held the same. See, e.g., *Cooper*, 437 F.3d at 329 (“[A] rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises a ground of recognized legal merit (provided it has a factual basis) and the court fails to address it.” (citation and quotation marks omitted)); *United States v. Diaz-Arqueta*, 447 F.3d 1167, 1171 (9th Cir. 2006) (reversing the district court’s sentence because it failed to consider relevant § 3553(a) factors). Note that while many circuits claim to reverse for procedural unreasonableness, sentencing statistics suggest they rarely do).

265. See, e.g., *Richardson*, 437 F.3d at 554 (noting that the presumption of reasonableness “does not relieve the sentencing court of its obligation to explain to the parties and the reviewing court its reasons for imposing a particular sentence”); *United States v. Davis*, 458 F.3d 491, 496 (6th

reasonableness assert that the district court made a legal error, and as such they are reviewed *de novo* on appeal.²⁶⁶ This is because while the Guidelines might be an important factor in reasonableness review, “[a] district court *may not* presume that they produce the ‘correct’ sentence.”²⁶⁷ *Booker* itself indicated that part of reasonableness review requires considering whether the district court accounted for relevant § 3553(a) factors: “Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts . . . in determining whether a sentence is unreasonable.”²⁶⁸

A district court’s failure to indicate how it considered relevant § 3553(a) factors would leave the appellate court unable to determine whether the district court weighted those factors reasonably or unreasonably.²⁶⁹ For this reason an appellate court may *not* presume the procedural reasonableness of a sentence simply because it falls within the guideline range.²⁷⁰ Instead, the court must be able to determine clearly from the record that the district court considered any relevant § 3553(a) factors raised by a party.²⁷¹

That most appellate courts do not presume a guideline sentence is procedurally reasonable means that the presumption applies only to the substantive component of a sentence—i.e., its length.²⁷² Indeed, it is only *after* the appellate court is satisfied that the district court’s sentence was procedurally reasonable that the presumption of reasonableness ordinarily becomes relevant.²⁷³

Cir. 2006) (discussing the presumption of reasonableness in the context of substantive reasonableness); *Cunningham*, 429 F.3d at 675-76; *Sanchez-Juarez*, 446 F.3d at 1117.

266. See, e.g., *Kristl*, 437 F.3d at 1054 (noting a *de novo* review for claims that “consider[] the district court’s application” of the Guidelines or the other § 3553(a) factors).

267. *United States v. Demaree*, 459 F.3d 791, 794-95 (7th Cir. 2006) (emphasis added); *Cunningham*, 429 F.3d at 675-76.

268. *Booker*, 543 U.S. at 261.

269. See Chanenson, *supra* note 263, at 148 (“The key is to provide a window into the discretionary sentencing process and to afford appellate courts something substantive to review.”).

270. See, e.g., *Cunningham*, 429 F.3d at 679 (“[W]henver a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, *before we can conclude that the judge did not abuse his discretion*, that he exercised his discretion, that is, that he considered the factors relevant to that exercise.” (emphasis added)); *Demaree*, 459 F.3d at 794-95.

271. *Cunningham*, 429 F.3d at 679; *Richardson*, 437 F.3d at 554; *Sanchez-Juarez*, 446 F.3d at 1117.

272. *Dexta*, 470 F.3d at 614-15 (discussing the presumption of reasonableness in the context of substantive reasonableness); *Davis*, 458 F.3d at 496 (discussing the presumption of reasonableness in the context of substantive reasonableness); *Cage*, 451 F.3d at 591 (distinguishing procedural from substantive reasonableness and discussing the presumption of reasonableness in a substantive context); *Mateo*, 471 F.3d at 1166 (“We determine substantive reasonableness by reference to the actual length of the sentence imposed in relation to the sentencing factors enumerated in § 3553(a).”).

273. See, e.g., *United States v. Buchanan*, 449 F.3d 731, 734 (6th Cir. 2006) (discussing the presumption of reasonableness in the context of substantive reasonableness); *Davis*, 458 F.3d at 496 (discussing the presumption of reasonableness in the context of substantive reasonableness). Further evidence for this comes in the fact that when the district court’s error is procedural, courts do not usually apply the presumption of reasonableness. See, e.g., *Cunningham*, 429 F.3d at 680 (vacating

Significantly, not all circuits treat the presumption of reasonableness this way. The Fifth Circuit in particular appears to have adopted a more dramatic *Booker* minimalist approach to appellate review. Under the Fifth Circuit's approach, a district court's guideline calculation encompasses *both* procedural and substantive reasonableness.²⁷⁴ If a sentence falls within the guideline range, on appeal the court "infer[s] that the [district court] has considered all the [§ 3553(a) sentencing] factors."²⁷⁵ The district court's failure to address a defendant's specific and non-frivolous § 3553(a) arguments for a variance would not necessarily constitute procedural error.²⁷⁶ Instead, "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required."²⁷⁷

The Fifth Circuit's application of presumptive reasonableness to both procedural and substantive components of a sentence is unusual, however, and other circuits have explicitly rejected it.²⁷⁸ That the approach exists, though, is significant in the *Rita* case.

2. *United States v. Rita*

Although *United States v. Rita* comes from the Fourth Circuit, it represents the unusual type of presumptive reasonableness that conflates the procedural and substantive components of a sentence. Under the majority rule outlined in the previous section, the facts in *Rita* would in theory have led most circuits to vacate the sentence as procedurally unreasonable.²⁷⁹ Interestingly, this means that they would have decided the case without presumptive reasonableness ever being relevant.²⁸⁰

In *Rita*, the court reviewed a defendant's appeal from a jury conviction and sentence on charges of perjury, obstruction of justice, and making false statements.²⁸¹ The district court had sentenced the defendant to 33-months' imprisonment, which was within the guideline range.²⁸² On

the lower court's sentence but neither discussing presumptive reasonableness nor "express[ing] [any] view on the proper sentence"); *Sanchez-Juarez*, 446 F.3d at 1117 (failing to consider presumptive reasonableness when the error was procedural).

274. *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *see also* *United States v. Sam*, 467 F.3d 857, 864 (5th Cir. 2006) ("When the district court imposes a sentence falling within a properly calculated Guidelines range, that sentence is presumptively reasonable and 'little explanation is required.'" (quoting *Mares*, 402 F.3d at 519)).

275. *Mares*, 402 F.3d at 519.

276. *See id.*

277. *Id.*

278. *See, e.g., Cooper*, 437 F.3d at 329–30 ("At least one court has held a sentencing judge is presumed to have considered all of the § 3553(a) factors if a sentence is imposed within the applicable guidelines range. *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005). We decline to follow this approach.").

279. *See* discussion *supra* Part IV.B.1.

280. This is because the presumption of reasonableness typically becomes relevant only *after* the appellate court has determined that a district court's sentence was procedurally reasonable. *See* discussion *supra* Part IV.B.1.

281. *United States v. Rita*, 177 Fed. Appx. 357, 358 (4th Cir. 2006).

282. *Rita*, 177 Fed. Appx. at 358.

appeal, the *Rita* court noted that a guideline sentence was entitled to presumption of reasonableness.²⁸³ The court held that the district court correctly calculated the guideline range, “consider[ed] the factors set forth in § 3553(a),” and consequently affirmed.²⁸⁴

Despite the *Rita* court’s assertion that the district court had “consider[ed] the factors set forth in § 3553(a),” the record appeared to show that it had not.²⁸⁵ Before sentencing, the defendant argued for a below-guideline variance based on his military service record, various health problems, that he did not represent a threat to the public, and that he would be a “likely . . . target” in prison for having worked as a law enforcement officer with the United States Immigration and Naturalization Service.²⁸⁶ Prior to imposing its sentence, however, the district court noted only that it was “unable to find that the sentencing guideline range . . . is an inappropriate guideline range [for the crimes] . . . and under 3553, certainly the public needs to be protected.”²⁸⁷ The record did not reflect any consideration of the defendant’s arguments based on his military record, physical condition, or service as a law enforcement officer.²⁸⁸

Each of the defendant’s arguments for a mitigated sentence were unaccounted for in the Guidelines and would be properly considered under § 3553(a). The guideline policy statements indicate that the Guidelines do not account for a defendant’s physical condition (§ 5H1.4), employment record (§ 5H1.5), or previous military service (§ 5H1.11).²⁸⁹ Yet § 3553(a) says that these factors “shall” be considered “in determining the particular sentence to be imposed”²⁹⁰ because they relate to “the history and characteristics of the defendant.”²⁹¹ Additionally, the district court failed to address the defendant’s argument that his physical safety in prison would be jeopardized because he had been a law enforcement officer. Under § 3553(a)(2)(D), however, the district court must consider the need to provide the defendant with “correctional treatment in the most effective manner.”²⁹² As such, all of the defendant’s § 3553(a) arguments that the district court ignored were relevant and nonfrivolous.

283. *Id.* (citing *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006)).

284. *Id.*

285. Brief for Petitioner at 48, *Rita v. United States*, No. 06-5754 (Dec. 18, 2006), available at <http://www.fpdmdnc.org/Rita/RitaMeritsBrief.Final.pdf>.

286. Petition for Writ of Certiorari, at 13–16, *Rita v. United States*, No. 06-5754 (Dec. 18, 2006).

287. Brief for Petitioner, *supra* note 285, at 48.

288. *Id.*

289. USSG, *supra* note 1, § 5H1.4, § 5H1.5, § 5H1.11.

290. 18 U.S.C. § 3553(a) (2000).

291. *Id.* § 3553(a)(1).

292. *Id.* § 3553(a)(2)(D).

In asserting that the district court had “consider[ed] the factors set forth in § 3553(a)” when the record appeared to reflect that it had not, the *Rita* court conflated procedural and substantive reasonableness in a way similar to that of the Fifth Circuit.²⁹³ Instead of vacating the sentence for procedural unreasonableness, *Rita* “infer[red] that the [district court] [had] considered all the [§ 3553(a) sentencing] factors”²⁹⁴ simply because the sentence was a guideline sentence. *Rita* presumed that because the sentence was a guideline sentence, it was both procedurally and substantively reasonable.

As detailed above, in most circuits a district court’s failure to consider a defendant’s arguments about mitigating § 3553(a) factors would render the sentence procedurally unreasonable.²⁹⁵ In fact, the Fourth Circuit itself has stated this as well. In *United States v. Moreland*,²⁹⁶ the court held that “[r]easonableness review involves both procedural and substantive components,” and a district court’s sentence “may be procedurally unreasonable . . . if the district court provides an inadequate statement of reasons [under § 3553(a)].”²⁹⁷ Under the approach used by most circuits—including the Fourth—the district court’s sentence in *Rita* should therefore have been reversed as procedurally unreasonable.²⁹⁸

3. The Uncertain Effect of *Rita*

That the “presumption of reasonableness” in *Rita* means something different than what it means in most circuits leaves a question about what impact it would have if the Supreme Court were to rule that the presumption violates *Booker*. According to the order list in *Rita*,²⁹⁹ the Court will review three questions: (1) whether the district court’s sentence was reasonable, (2) whether *Booker* prohibits the presumption of reasonableness for guideline sentences, and (3) whether the presumption can justify a sentence unaccompanied by an explicit analysis of relevant § 3553(a) factors.³⁰⁰ To affirm, the Supreme Court would have to find that a presumption of reasonableness can validly apply to *both* procedural (Question 3) and substantive (Question 2) components of a sentence.

To vacate the sentence, however, the Court may—but need *not*—decide the procedural and substantive questions. The facts in *Rita* would allow the Court to remand the case on either (or both) of these issues.

293. See discussion *supra* Part IV.B.1.

294. *Mares*, 402 F.3d at 519.

295. See discussion *supra* Part IV.B.1.

296. 437 F.3d 424 (4th Cir. 2006).

297. *Moreland*, 437 F.3d at 434.

298. In theory these courts would have reversed on these facts. In practice, though, procedurally unreasonable sentences are sometimes affirmed even though they are procedurally unreasonable. See *supra* note 264 (discussing how statistics seem to indicate that at least some procedurally unreasonable sentences are nevertheless affirmed).

299. See *Miscellaneous Orders of the Court*, *supra* note 2.

300. *Id.*

The Court could narrow the scope of its opinion by holding only that the appellate court improperly applied the presumption of reasonableness to the *procedural* component of the sentence. This would leave the question of whether the presumption can apply to a sentence's *substantive* component unanswered.

If the Court narrows its opinion in this way and holds only that *Rita* erred in affirming the sentence because the district court did not consider the defendant's § 3553(a) arguments, it would not represent a dramatic departure from what most circuits already claim to be doing. Most circuits treat procedural reasonableness as a prerequisite to presumptive reasonableness.³⁰¹ Unlike in *Rita*, these circuits generally do not presume a sentence is procedurally reasonable simply because it falls within the Guidelines. Only *after* the appellate court is satisfied that the district court's sentence was procedurally reasonable does the presumption of reasonableness become relevant—i.e., as it relates to the substantive (length) component of the sentence.³⁰² A decision striking down *Rita* on narrow procedural reasonableness grounds would therefore leave the majority of circuits exactly where they are currently.

At least one member of the Supreme Court has expressed a desire to narrow the scope of the Court's rulings to promote unanimity on contentious issues.³⁰³ A narrow opinion in *Rita* focused only on procedural reasonableness may promote such unanimity within the Court, but it would come at the price of a lost opportunity to clarify what role the Guidelines should have in the substantive aspect of reasonableness review. An opinion addressing how presumptive reasonableness applies substantively to a sentence would have a much broader effect and would assist courts in identifying the proper role of the Guidelines after *Booker*.

Part V proposes one approach to reasonableness review that addresses this substantive issue.

C. *United States v. Claiborne and Proportionality*

In the second *Booker* minimalism case to be decided this spring, *United States v. Claiborne*,³⁰⁴ the Supreme Court will review proportionality and whether it is consistent with *Booker* to require that a district court show extraordinary circumstances whenever its sentence substantially varies from the Guidelines.³⁰⁵ As detailed in Part III, all of the circuits except the Second, Third, and Ninth have adopted proportionality as a part of their reasonableness review.³⁰⁶ The central issue that *Clai-*

301. See discussion *supra* Part IV.B.1.

302. *Id.*

303. Chief Justice John Roberts in particular has expressed this inclination. See *supra* note 255.

304. 439 F.3d 479 (8th Cir. 2006).

305. See *Miscellaneous Orders of the Court*, *supra* note 2.

306. See discussion *supra* Part III.B.

borne presents is whether *Booker* permits an approach wherein the Guidelines serve as *the* metric for determining if a sentence is unreasonable.

As in *Rita*, the important question in *Claiborne* is how the Supreme Court addresses the issue before it. Depending on how narrowly or broadly the Court frames *Claiborne*, the case may or may not have a substantial impact on guideline-centric *Booker* minimalism among the circuits.

1. *United States v. Claiborne*

In *Claiborne*, the district court correctly calculated a 37–46 month guideline range resulting from the defendant’s guilty pleas for possession of cocaine base.³⁰⁷ The court acknowledged the guideline range but sentenced the defendant to 15 months.³⁰⁸ It justified the variance based on the defendant’s lack of criminal history, youth, the small quantity of drugs involved, and the court’s opinion that he was unlikely to commit similar crimes in the future.³⁰⁹ The government appealed the 15-month sentence as unreasonable under § 3553(a).³¹⁰

On appeal, *Claiborne* vacated the district court’s below-guideline sentence as substantively unreasonable.³¹¹ The court examined the reasons the district judge had cited for the variance and criticized some on the ground that they had already been accounted for in the Guidelines.³¹² While the district court had “properly considered” the unlikelihood the defendant would reoffend as a basis for its variance, *Claiborne* disputed the weight that the finding should have based on the fact that the defendant had been charged with possession of cocaine on more than one occasion in the past.³¹³ The *Claiborne* court did not comment on the district court’s other justification about the defendant’s young age, but nevertheless found that the district court’s reasons for varying the sentence were not “extraordinary.”³¹⁴ Because a district court’s reasons for varying a sentence must be compelling “to the extent of the difference between the [Guidelines] advisory range and the sentence imposed,”³¹⁵ the district court’s “60 percent” downward variance from the lower end of the Guideline range was “extraordinary . . . [and] not supported by comparably extraordinary circumstances.”³¹⁶

307. *Claiborne*, 439 F.3d at 480.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 481.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* (citing *United States v. Johnson*, 427 F.3d 423, 426–27 (7th Cir. 2005)).

316. *Id.* The discrepancy between a sentence and the applicable guideline range is typically described as either a percentage of a sentence’s variance from the guideline range or simply the

2. Proportionality: Non-Guideline Sentences Presumptively *Unreasonable*?

Proportionality in *Claiborne*, as in other circuits, employs levels of scrutiny when evaluating non-guideline sentences. District courts must justify such sentences by citing extenuating offender characteristics or offense conduct proportional to the extent of the variance.³¹⁷ Proportionality asks if, in light of the extenuating § 3553(a) factors, the non-guideline sentence was reasonable.³¹⁸

Appellate review of non-guideline sentences is an important issue because it relates to the extent judges have discretion to individually tailor sentences.³¹⁹ That the Guidelines were “advisory” and that judges had more discretion to vary sentences is precisely what prevented the Guidelines from being declared unconstitutional in *Booker*.³²⁰ Examining proportionality is therefore important because “it is the non-Guideline presumptions, rather than the guideline presumptions, that express most clearly the threat of appellate reversal associated with this exercise of discretion.”³²¹

If proportionality means that non-guideline sentences are presumed *unreasonable* on appeal, then post-*Booker* sentencing begins to look like the mandatory system that *Booker* struck down.³²² *Claiborne* arises from the Eighth Circuit, which has held that guideline sentences are presumptively reasonable.³²³ When a court adopting presumptive reasonableness also adopts proportionality, the question naturally arises whether there is a presumption of *unreasonableness* for non-guideline sentences. The circuit courts that have addressed this question have held that non-guideline sentences are *not* presumptively *unreasonable*.³²⁴ The courts

number of months’ difference between the sentence and the guideline range. Compare *Claiborne*, 439 F.3d at 481 (focusing on the “60 percent” variance from the lower end of the guideline range), with *United States v. Maloney*, 466 F.3d 663, 668 (8th Cir. 2006) (focusing on the “number of the number of offense levels traversed by a variance”).

317. See discussion *supra* Part III.B; see also *United States v. Bishop*, 469 F.3d 896, 907 (10th Cir. 2006) (“[T]he extremity of the variance between the actual sentence imposed and the applicable Guidelines range should determine the amount of scrutiny we give to the district court’s substantive sentence.”).

318. *Cage*, 451 F.3d at 594–95.

319. *Citron*, *supra* note 245, at 151.

320. *Booker*, 543 U.S. at 245.

321. *Citron*, *supra* note 245, at 151.

322. *Hernandez*, *supra* note 159, at 252.

323. *Lincoln*, 413 F.3d at 716.

324. See, e.g., *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. Ferguson*, 456 F.3d 660, 664–665 (6th Cir. 2006) (“Although sentences within the Guidelines range are afforded a presumption of reasonableness, sentences falling outside the Guidelines range are neither presumptively reasonable nor presumptively unreasonable.”); *United States v. Howard*, 454 F.3d 700, 703 (7th Cir. 2006); *United States v. Myers*, 439 F.3d 415, 417 (8th Cir. 2006); *United States v. Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006) (stating that although guideline sentences are presumptively reasonable, it “does not mean, however, that a variance sentence is presumptively unreasonable” (citation omitted)).

recognize that such a holding “would transform an ‘effectively advisory’ system . . . into an effectively mandatory one” that violates *Booker*.³²⁵

Interestingly, though, courts do not ignore the fact that guideline sentences are presumptively reasonable when weighing non-guideline sentences.³²⁶ Indeed, in some cases “the presumption in favor of guideline sentences has been cited as a decisional factor in several cases where the sentence imposed was a downward variance.”³²⁷

The fact that the presumption for Guideline sentences was even cited in these cases suggests that the presumption’s influence has begun to creep into judges’ consideration of all sentences In other words, the very inference that should not be drawn from the presumption—that non-Guideline sentences are presumptively unreasonable—may be taking hold.³²⁸

Regardless of what the circuit courts have asserted, using presumptive reasonableness as a method of evaluating guideline sentences along with proportionality as a method of evaluating *non*-guideline sentences may be creating an implicit presumption of unreasonableness for non-guideline sentences. This is an important issue that *Claiborne* allows the Supreme Court to consider.

Part V proposes one approach to reasonableness review that would refine the use of proportionality and address the concern that it inhibits judicial discretion in violation of *Booker*.

3. Impact of *Claiborne*

The difficulty in evaluating proportionality is that the nature of its inquiry—whether circumstances are sufficiently extraordinary to justify a substantial variance—“is not one that allows for precision in measurement.”³²⁹ The Tenth Circuit, for example, has noted that “there are no strict guideposts that invoke certain levels of scrutiny; there is no formula into which we input the degree of divergence in order to generate precisely how compelling the district court’s reasons need be.”³³⁰ The rule requiring “extraordinary circumstances” for “substantial variances” may be so vague that it means very little outside the fact-specific context of each particular case.

In *Claiborne*, the Supreme Court therefore faces the difficulty of weighing an issue that is admittedly ambiguous and that varies in every

325. *Valtierra-Rojas*, 468 F.3d at 1239-40 (quoting *Moreland*, 437 F.3d at 433).

326. *Hernandez*, *supra* note 159, at 252; *see, e.g., Cage*, 451 F.3d at 593 (“Our holding in *Kristl*, that within-the-guidelines sentences are entitled to a presumption of reasonableness, *speaks to how we should consider sentences outside the guidelines range.*” (emphasis added)).

327. *Hernandez*, *supra* note 159, at 252.

328. *Id.* (internal footnote omitted).

329. *Valtierra-Rojas*, 468 F.3d at 1240.

330. *Id.*

instance. The Court will be reviewing whether circuits have erred in requiring “extraordinary” circumstances when sentences “substantially” vary from the Guidelines. Yet the circuits themselves have acknowledged that these are difficult terms to define in a way that would allow for a ruling that applies in every circuit.

The *Claiborne* case, like *Rita*, leaves the Court with significant latitude in deciding the issue before it. What the decision will mean for lower courts depends on how broadly the Supreme Court defines proportionality. How would its rejection of proportionality affect those circuits who do not explicitly adopt proportionality but nevertheless find the Guidelines helpful “in calibrating the review for reasonableness”?³³¹ Would courts still be permitted to identify the Guidelines as “not just another factor” and as deserving “heavy weight” in reasonableness review?³³²

These questions relate to the basic issue that *Booker* minimalism presents—i.e., whether the Guidelines have a special weight in sentencing and in appellate review among the § 3553(a) factors. If the Court rules on proportionality but fails to address the underlying issue of *Booker* minimalism, the pattern of guideline sentences that has occurred in the aftermath of *Booker* may continue.

V. BALANCING *BOOKER* MINIMALISM WITH *BOOKER* AND § 3553(a)

As previously discussed,³³³ *Rita* and *Claiborne* highlight the tension existing between *Booker* minimalism on one side and the exercise of independent judicial discretion required by § 3553(a) and *Booker* on the other. The specific issues in these cases—presumptive reasonableness and proportionality—are the vehicles that allow for the Supreme Court to consider this tension.

A. *A New Standard of Reasonableness Review*

One way to balance this tension would be for district courts to impose non-guideline sentences whenever the Guidelines fail to account for or inadequately account for offense conduct or offender characteristics. This would mean that the presumption of reasonableness and proportionality violate *Booker* whenever nonfrivolous circumstances exist for which the Guidelines do not already account or for which they inadequately account.³³⁴ This approach would provide an appropriate balance between guideline-centric *Booker* minimalism and the requirements of *Booker* and § 3553(a). It may also represent an improved approach to

331. *Rattoballi*, 452 F.3d at 133.

332. *See Cage*, 451 F.3d at 593; *United States v. Terrell*, 445 F.3d 1261, 1264 (10th Cir. 2006).

333. *See supra* Part IV.A.

334. I am sincerely grateful to Benji McMurray for providing this basic formulation and for assisting in developing it. *See United States v. Sosa-Acosta*, 06–4174, Appellant’s Br. at 12–13.

reasonableness review in the Tenth Circuit and is one way of addressing *Rita* and *Claiborne*.

The Guidelines already account for a number of factors properly considered under § 3553(a).³³⁵ This is not surprising considering that Congress explicitly instructed the USSC to promulgate Guidelines that would meet the “purposes of sentencing as set forth in [§ 3553(a)(2)].”³³⁶ These are the same purposes that all of the § 3553(a) factors are directed toward—i.e., the need for a sentence to reflect the seriousness of the offense, to deter future criminal conduct, to protect the public from further crimes, and to provide the defendant with needed treatment.³³⁷ So, for example, the Guidelines contain a number of “adjustments” that can be made to a guideline calculation based on the role that a defendant had in a crime.³³⁸ If the defendant’s role was “minimal” or “minor,” it may justify up to a four-level decrease in that defendant’s offense level.³³⁹ Or, a defendant admitting guilt is entitled to a three-level decrease in his or her offense level calculation.³⁴⁰ A defendant’s previous criminal history or lack thereof is also already part of the guideline calculation.³⁴¹

When the Guidelines account for all relevant § 3553(a) factors in a particular case, a guideline-centric approach is appropriate. In such cases, a presumption of reasonableness for guideline sentences would not violate *Booker* because the Guidelines reflect the relevant offender characteristics and offense conduct.³⁴² For the same reason, proportionality would be a valid method of reviewing the sentence if it fell outside the Guidelines.

As detailed in Part II, the Guidelines expressly avoid consideration of a number of possibly mitigating offender characteristics.³⁴³ Because these characteristics “are difficult to measure systematically and cannot be easily plotted on a sentencing chart,”³⁴⁴ they are not ordinarily reflected in a guideline range. Such characteristics include, among others, a defendant’s age, physical or mental status, education, and military or civil service.³⁴⁵

335. See, e.g., *United States v. Buchanan*, 449 F.3d 731, 735–36 (6th Cir. 2006) (Sutton, J., concurring) (detailing how the Guidelines reflect other § 3553(a) factors); *United States v. Wilson*, 350 F. Supp. 2d 910, 915 (D. Utah 2005).

336. 28 U.S.C. § 991(b)(1)(A) (2000).

337. 18 U.S.C. § 3553(a)(2) (2000).

338. USSG, *supra* note 1, § 3B1.2.

339. *Id.*

340. *Id.* § 3E1.1.

341. *Id.* § 4A1.1.

342. Note that this presumption would apply only to the substantive as opposed to the procedural component of the sentence. See discussion *supra* Part IV.A.1.

343. See *supra* Part II.C.1.

344. Berman, *supra* note 147, at 290.

345. See USSG, *supra* note 1, § 5H1.1-1.12.

Whenever such circumstances are present, the presumption of reasonableness and proportionality inhibit the judicial discretion required by *Booker* and § 3553(a).³⁴⁶ The reason these circumstances are not included in the Guidelines is precisely because they require the type of individualized judicial consideration that Congress had envisioned in § 3553(a) and that *Booker* had mandated. Their presence in a particular case means that the Guidelines, by themselves, inadequately reflect the relevant sentencing concerns. In such cases, presumptive reasonableness and proportionality impair appellate courts' reasonableness review by unjustifiably centering it around the Guidelines.

B. Cases Where the Guidelines Inadequately Reflect § 3553(a) Factors

Even in those cases where the Guidelines account for all relevant § 3553(a) factors, presumptive reasonableness and proportionality may yet be inappropriate.

In particular, they should not be used whenever the Guidelines *inadequately* account for either offense conduct or offender characteristics.³⁴⁷ These situations can arise frequently. The most prominent and criticized example of the Guidelines inadequately accounting for offense conduct is the 100:1 crack/powder cocaine disparity in sentencing.³⁴⁸ Under this system, it takes 100 times less crack cocaine than it does powder cocaine to equal the same offense level.³⁴⁹ Though the crack/powder cocaine disparity may receive the most attention, other examples can be found as well. One federal district court sentenced a defendant to time served plus three months of supervised release for illegal possession of a sawed-off shotgun even though the guideline range called for a 20–30 month sentence.³⁵⁰ In justifying this variance, the court cited the “almost innocent circumstances surrounding the shorten-

346. This applies only to nonfrivolous circumstances and arguments. See, e.g., *United States v. Cunningham*, 429 F.3d 673, 678 (7th Cir. 2005) (“A sentencing judge has no more duty than we appellate judges do to discuss every argument made by a litigant; arguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence.” (citations omitted)).

347. Amy Baron-Evans, National Sentencing Resource Counsel for the Federal Public and Community Defenders, has compiled a number of instances where courts have determined that the Guidelines inaccurately account for offense conduct or offender characteristics. See *Sentencing Post-Booker*, Apr. 10, 2006, at 13–14, http://www.fd.org/pdf_lib/sentencing41006.pdf. The *Myers* example given in this paragraph comes from Baron-Evans's compilation.

348. *Id.* at 15–16. The United States Sentencing Commission has questioned whether this disparity is justified. See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY viii (2002) [hereinafter USSC SPECIAL REPORT], available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; see also AMERICAN CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW (2006), available at http://www.aclu.org/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

349. USSC SPECIAL REPORT, *supra* note 348, at iv. Note that this is an issue in *Claiborne* as well. *United States v. Claiborne*, 439 F.3d 479, 480–81 (8th Cir. 2006).

350. *United States v. Myers*, 353 F. Supp. 2d 1026, 1032 (S.D. Iowa 2005).

ing of the Defendant's gun" as one of a number of circumstances inadequately accounted for in the Guidelines.³⁵¹

Courts have also recognized that the career offender Guideline (USSG § 4B1.1) in particular "can produce a penalty greater than necessary to satisfy the purposes of sentencing."³⁵² For example, the Second Circuit has noted that:

In some circumstances, a large disparity in [the relationship between the Guideline-mandated increase and the nature of the previous crime] might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to constitute a mitigating circumstance present "to a degree" not adequately considered by the Commission.³⁵³

In at least one instance the Tenth Circuit has expressed "grave misgivings" about whether the § 4B1.1 career offender Guideline accurately accounted for the facts in a particular case.³⁵⁴ In an opinion authored by Judge McConnell, the court questioned whether a procedurally proper 16-level guideline enhancement for a previous conviction was nevertheless unreasonable in light of the nature of that previous crime.³⁵⁵ Though the defendant's attorney failed to raise the issue, the court on its own indicated that this would be an instance where "an exercise of *Booker* discretion could mitigate a sentence that does not fit the particular facts of the case."³⁵⁶

Presumptive reasonableness and proportionality thus violate *Booker* not only when the Guidelines fail to address particular circumstances, but also when they fail to address the circumstances adequately. Prohibiting these methods of appellate review in such instances ensures that *all* relevant offense conduct and offender characteristics are taken into account and that courts are able to appropriately exercise the judicial discretion required by § 3553(a).³⁵⁷

351. *Myers*, 353 F. Supp at 1032.

352. *United States v. Fernandez*, 436 F. Supp. 2d 983, 988 (E.D. Wis. 2006) (citing *United States v. Mishoe*, 241 F.3d 214, 220 (2d Cir. 2001)).

353. *Mishoe*, 241 F.3d at 220.

354. *United States v. Hernandez-Castillo*, 449 F.3d 1127, 1131 (10th Cir. 2006).

355. *Hernandez-Castillo*, 449 F.3d at 1131.

356. *Id.* at 1132. Note that the *Sanchez-Juarez* case, which outlined the requirements of procedural reasonableness in the Tenth Circuit, resulted from a defendant arguing that the Guidelines inadequately accounted for a previous conviction. *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1117 (10th Cir. 2006). See discussion *supra* Part I.D.

357. Cf. Berman, *supra* note 147, at 288 ("[N]o matter what theories or goals are pursued within a sentencing system, both offense conduct and offender characteristics should play a significant role in sentencing decisionmaking.").

CONCLUSION

United States v. Booker rendered the Guidelines “effectively advisory,” but post-*Booker* case law and sentencing statistics indicate that courts nevertheless continued to view them as more than advisory. Indeed, most adopted a “*Booker* minimalist” approach that interpreted the case as having made only a modest adjustment to the role of the Guidelines. Though no longer mandatory, the Guidelines maintained a special weight in sentencing and in appellate review compared to the other § 3553(a) sentencing factors.

The Tenth Circuit provides an example of how many appellate courts adopted a *Booker* minimalist approach in reviewing district court sentences for reasonableness. The court presumes that guideline sentences are reasonable, but requires district courts to justify non-guideline sentences by citing extenuating circumstances proportional to the extent of the variances. Not all circuits adopted the “presumption of reasonableness” and “proportionality” methods of reviewing guideline and non-guideline sentences. But even these circuits exhibit a *Booker* minimalist approach to their review that tends to equate the Guidelines with reasonableness.

This spring, the Supreme Court will consider the presumption of reasonableness and proportionality in the *Rita* and *Claiborne* cases. At issue is whether these methods of appellate review violate *Booker*. The prominence of *Booker* minimalism among even those circuits that reject presumptive reasonableness and proportionality raises an important question about what effect it would have if the Court were to strike down either method. If the Court fails to address the underlying issue of *Booker* minimalism—i.e., that the Guidelines have a special weight among the § 3553(a) factors—the post-*Booker* pattern of guideline sentences may continue.

In addition, the unusual definition of “presumption of reasonableness” in *Rita* means that the Supreme Court could fashion a narrow opinion that would have only a limited impact. Whereas in almost every circuit the presumption of reasonableness applies only to the substantive (length) component of a district court’s sentence, in *Rita* it applies to the procedural component as well. The Court could reject the presumption as it applies to procedural reasonableness without addressing its ordinary application to substantive reasonableness. A narrow opinion focused only on this procedural component might achieve greater unanimity within the Court, but it would come at the price of a lost opportunity to address how the presumption of reasonableness ordinarily functions in appellate review.

The underlying issue in the *Rita* and *Claiborne* cases is the tension that exists between *Booker* minimalism on one side and the exercise of independent judicial discretion required by § 3553(a) and *Booker* on the

other. One compelling justification for guideline-centric *Booker* minimalism is the important role of the Guidelines in promoting sentencing uniformity. The justification is imperfect, though, because the Guidelines do not account for a number of circumstances that judges must always consider when fashioning a “sufficient, but not greater than necessary” sentence under § 3553(a). The Guidelines do not account for these circumstances precisely because they merit individualized judicial consideration. Furthermore, even when the Guidelines account for certain circumstances, they may do so inadequately. Common examples include the 100:1 crack/powder cocaine disparity and the occasionally rigid career offender guideline section. The individualized judicial consideration required by *Booker* and § 3553(a) is therefore undermined by *Booker* minimalism whenever the Guidelines fail to account for or inadequately account for all relevant sentencing considerations.

One way to balance this tension would be for district courts to impose non-guideline sentences whenever the Guidelines fail to account for or inadequately account for offense conduct or offender characteristics. This would mean that appellate courts should refrain from using the presumption of reasonableness or proportionality whenever nonfrivolous circumstances exist for which the Guidelines do not already account or for which they inadequately account. Rejecting presumptive reasonableness or proportionality when these circumstances are present prevents courts from unjustifiably centering their appellate review around the Guidelines.

The approach to reasonableness review outlined here incorporates the goal of sentencing uniformity but ensures that courts also account for defendants’ individual circumstances. A *Booker* minimalist approach can aid courts in pursuing uniformity, but true uniformity can only be achieved when circumstances that the Guidelines ignore or inaccurately reflect are also considered. The sentencing statute, after all, calls for avoiding *unwarranted* sentencing disparities, not sentencing disparities per se.³⁵⁸ Rejecting presumptive reasonableness or proportionality in these cases may not yield a “formal outcome equality,”³⁵⁹ but any disparities that result would not be unwarranted.³⁶⁰ Uniformity would thus be achieved not by requiring equal sentencing outcomes, but by ensuring that every defendant’s sentence reflects the proper balance of sentencing considerations. District courts should be secure in their ability to exer-

358. § 3553(a)(6).

359. Marc L. Miller, *The Foundations of Law: Sentencing Equality Pathology*, 54 EMORY L.J. 271, 277 (2005).

360. § 3553(a)(6); see also Miller, *supra* note 359, at 275 (noting that “[Congress] sought to reduce ‘unwarranted’ sentencing disparities though guidelines” and that *variations were implicitly warranted* in the “listing [of] various factors for the Commission to consider . . .”).

cise “reasoned judgment”³⁶¹ in sentencing whenever the Guidelines fail to account for important § 3553(a) factors.

*Jeffrey S. Hurd**

361. Berman, *supra* note 17, at 388; *see also* Gertner, *supra* note 117, at 140–41 (“Reasonable-ness review should mean . . . interpreting the Guidelines not as atomistic civil code rules, but in context, in the light of all the § 3553(a) purposes.”).

* J.D. Candidate, 2008, University of Denver Sturm College of Law. I would like to thank Benji McMurray for his invaluable guidance, David Remus and Brian Hurd for their input on drafts, and Sarah Benjes, Gracie Aguirre, and the *Law Review* staff for their assistance and forbearance. Finally, I would like to thank my wife, Barbora, for her patience and constant support.

PEOPLES v. CCA DETENTION CENTERS: THE TENTH CIRCUIT LIMITS INMATE CONSTITUTIONAL RIGHTS

INTRODUCTION

The costs of operating state-run prison systems are becoming increasingly prolific. As a result, many states have resorted to using privately-run prisons to defray the costs, a strategy that appears to be working.¹ Practical and moral arguments regarding the privatization of prisons aside, this development has also given rise to various legal questions. One of these questions is whether federal prisoners may bring a damages suit against the employees of these private prisons for constitutional violations.

In 1971, the Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*² in which it held that federal agents may be held liable for monetary damages for constitutional violations.³ The increasing privatization of prisons has raised the issue of whether an analogous suit may be brought against the employees of privately-run prisons. In *Peoples v. CCA Detention Centers*,⁴ a split decision, the Tenth Circuit was the first circuit court to hold that the existence of a state remedy precluded the need for a federal cause of action and thus denied Mr. Peoples relief.⁵ This decision was later vacated by a twelve judge en banc decision that split 6-6.⁶ Subsequently, the Fourth Circuit, citing *Peoples*, also held that these claims do not state a federal cause of action when there is an adequate state law remedy.⁷ However, district courts in other circuits have held that the existence of a state law cause of action does not preclude federal relief.⁸ Thus, this issue has divided not only the Tenth Circuit judges, but also the circuits them-

1. On average, states with 20% or more privately-run prisons had an average increase in prison costs from 1997-2001 of 24.34%. This is significantly less than the increase for states with less than 20% privately-run prisons, 32.72%. Importantly, of the six states in the Tenth Circuit, Colorado, New Mexico, and Oklahoma have more than 20% privately-run prisons. In Utah, a state with less than 20% privately run prisons, the cost per diem is \$125.40, whereas in Oklahoma, the cost is \$43.34. Paul Guppy, Policy Brief, *Private Prisons and the Public Interest: Improving Quality and Reducing Cost through Competition*, WASH. POLICY CENTER, Feb. 2003, available at <http://www.washingtonpolicy.org/ConOutPrivatization/PBGuppyPrisonsPublicInterest.html>.

2. 403 U.S. 388 (1971).

3. *Bivens*, 403 U.S. at 389.

4. 422 F.3d 1090 (10th Cir. 2005) (2-1 decision), *vacated*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

5. *Peoples*, 422 F.3d at 1108.

6. *Peoples*, 449 F.3d at 1099.

7. *Holly v. Scott*, 434 F.3d 287, 296 (4th Cir. 2006).

8. See *Vector Research Inc. v. Howard & Howard Attorneys*, 76 F.3d 692, 695 (6th Cir. 1996); *Showengardt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1331 (9th Cir. 1987).

selves and is a subject that, as stated by Circuit Judge Ebel in his dissenting opinion in *Peoples*, "ought to be decided by the Supreme Court."⁹

Part I of this article discusses the background of how causes of action against federal officers evolved from related statutory provisions. Part II discusses the majority and dissenting opinions from *Peoples v. CCA Detention Centers*. Part III discusses related decisions from other circuits. Part IV analyzes these conflicting views and argues that the Tenth Circuit's position on this issue is inconsistent with *Bivens*' underlying rationale. Finally, in Part V, this comment concludes that this is an issue that will likely reoccur frequently and will thus necessitate a Supreme Court decision.

I. BACKGROUND

Officers in state-run prisons may be sued for constitutional violations under 42 U.S.C. § 1983.¹⁰ In addition, since 1949, the Supreme Court has held that federal officers may be sued for injunctive relief for federal violations.¹¹ However, until 1971, the Supreme Court had yet to rule whether a plaintiff could sue federal officers for constitutional violations for money damages.¹² In *Bivens*, the Court answered this question in the affirmative.¹³ An analysis of the question whether private prison employees should be subject to suits for damages flowing from constitutional violations requires discussion of *Bivens* and its progeny.

9. *Peoples*, 422 F.3d at 1108 n.2 (Ebel, J., dissenting).

10. 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

Thus, in order to prevail in a suit against a State under § 1983, a plaintiff must prove "that there was state action. The reason for this is fundamental. The [F]ifth and [F]ourteenth Amendments, which . . . guarantee due process of law, apply to the acts of state and federal governments, and not to the acts of private parties or entities." Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 577 (1989). However, this potential for liability is tempered by the availability of qualified immunity. See Paul Howard Morris, *The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 VAND. L. REV. 489, 504-08 (1999).

11. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 588 (4th ed. 2003) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)).

12. *Id.*

13. *Bivens*, 403 U.S. at 389.

A. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*

Mr. Bivens alleged that federal narcotics agents entered his apartment, arrested him in front of his family, and thoroughly searched his home for drugs.¹⁴ In addition, he was later forced to submit to a visual strip search.¹⁵ He was never prosecuted.¹⁶ Mr. Bivens brought suit in district court, claiming the searches were in violation of his Fourth Amendment rights.¹⁷ He sought money damages from the officers for his humiliation and pain and suffering.¹⁸ The district court and Second Circuit Court of Appeals both dismissed the case, holding that it “failed to state a cause of action.”¹⁹ Specifically, the Court of Appeals held that “the Fourth Amendment does not provide a basis for a federal cause of action for damages arising out of an unreasonable search and seizure.”²⁰ The courts concluded that Mr. Bivens’ proper avenue of relief was through a state law trespass claim.²¹

The Supreme Court reversed, holding that a violation of the Fourth Amendment’s guarantee of freedom from unreasonable searches and seizures “gives rise to a cause of action for damages consequent upon . . . unconstitutional conduct.”²² Specifically, the Court held that a constitutional claim should not be confined to a state cause of action because “the interests protected by state laws regulating . . . the invasion of privacy[] and those protected by the Fourth Amendment[] . . . may be inconsistent or even hostile.”²³ In addition, the Court held that the Fourth Amendment protections are not “co-extensive to those found under state law.”²⁴ Finally, the Court concluded that even though the Fourth Amendment does not explicitly allow for an award of money damages for its violation, “it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.”²⁵ Thus, the Court reasoned that it may imply a constitu-

14. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

15. *Id.* Specifically, Mr. Bivens “claimed to have suffered great humiliation, embarrassment, and mental suffering.” *Id.* at 389-90.

16. MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 350 (3d ed. 2001).

17. *See Bivens*, 403 U.S. at 389.

18. *Id.* at 390.

19. *Id.*

20. CHEMERINSKY, *supra* note 11, at 591 (citing *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 409 F.2d 718, 719 (2d. Cir. 1969), *rev’d*, 403 U.S. 388 (1971)).

21. *See Bivens*, 409 F.2d 718, 726 (2d. Cir. 1969), *rev’d*, 403 U.S. 388 (1971); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 276 F. Supp. 12, 15 (E.D.N.Y. 1967).

22. *Bivens*, 403 U.S. at 389.

23. *Id.* at 394.

24. Lumen N. Mulligan, *Why Bivens Won't Die: The Legacy of Peoples v. CCA Detention Centers*, 83 DENV. U. L. REV. 685, 688 (2005) (citing *Bivens*, 403 U.S. at 392-94).

25. *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

tional cause of action when three conditions were met.²⁶ First, there must be a federal statute granting a right to sue.²⁷ Second, there must be no "special factors counseling hesitation."²⁸ Finally, there must be no special congressional declaration stating that money damages may not be awarded for constitutional violations.²⁹ As none of these three considerations were present, the Court held that money damages were appropriate.³⁰

B. *Bivens*' Progeny

Since *Bivens* was decided, the Court has consistently refused to expand its scope. In *Davis v. Passman*,³¹ the Court faced the question of whether a congressman's female aide, who was fired because the congressman wanted a male aide, could bring a *Bivens* claim.³² The Court determined that *Bivens* was not necessary because the Fifth Amendment directly implied a cause of action.³³

In *Carlson v. Green*,³⁴ a mother sued prison officials on behalf of her deceased son, who she claimed was the victim of a violation of the Eighth Amendment's guarantee from cruel and unusual punishment.³⁵ She alleged that there had been gross inadequacies at the federal prison where he had been incarcerated.³⁶ For the first time, the Court was faced with a situation where an alternate federal remedy was available, in this case under the Federal Tort Claims Act (FTCA).³⁷ In response to the prison's claims that the FTCA precluded the *Bivens* claim, the Court referenced language in *Bivens* and *Davis* that stated that the alternative congressional remedy must be "explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."³⁸ In addition, the Court held that there were four other reasons why the *Bivens* claim should be allowed.³⁹ First, the *Bivens* claim "in addition to compensating victims, serves a deterrent purpose."⁴⁰ Second, punitive damages were available in *Bivens* actions, but statutorily prohibited in FTCA actions.⁴¹ Third, jury trials are allowed in *Bivens* actions,

26. Mulligan, *supra* note 24, at 689 (citing *Bivens*, 403 U.S. at 396-97).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 442 U.S. 228 (1979).

32. *Davis*, 442 U.S. at 230.

33. *See id.* at 243-44.

34. 446 U.S. 14 (1980).

35. *Carlson*, 446 U.S. at 16.

36. *Id.* at 16 n.1.

37. CHEMERINSKY, *supra* note 11, at 598.

38. *Carlson*, 446 U.S. at 18-19 (citing *Bivens*, 403 U.S. at 397; *Davis*, 442 U.S. 245-47).

39. *Carlson*, 446 U.S. at 20-21.

40. *Id.* at 21.

41. *Id.* at 21-22.

but forbidden under the FTCA.⁴² Finally, the FTCA claims exist only if “the [s]tate in which the alleged misconduct occurred would permit a cause of action.”⁴³ For these reasons the Court concluded that Ms. Green’s *Bivens* claim stated a valid cause of action. However, *Davis* and *Carlson* are the only two instances when the Court has allowed money damages against federal officers for constitutional violations.⁴⁴

Most of the subsequent litigation involving *Bivens* claims has restricted the cause of action’s scope.⁴⁵ For example, in *Bush v. Lucas*,⁴⁶ a NASA employee sued under the First Amendment, claiming he had been demoted for critical statements he had made about the agency.⁴⁷ The Supreme Court upheld the district court’s ruling that a *Bivens* cause of action did not exist because of “the comprehensive procedural and substantive provisions giving meaningful remedies.”⁴⁸ Moving away from the “equally effective” language of *Carlson*, the Court held that a congressionally created remedy would be sufficient to bar a *Bivens* claim, if it provides a “meaningful remed[y]” . . . even if the other remedy does not “provide complete relief for the plaintiff.”⁴⁹ Similarly, in *Schweiker v. Chilicky*,⁵⁰ the Court found the existence of merely adequate alternative congressional remedies to be dispositive.⁵¹ In *Schweiker*, social security beneficiaries sued federal officers for violation of their due process rights when they were denied their social security.⁵² The Court held that “[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.”⁵³ Thus, both *Bush* and *Schweiker* limited *Bivens* actions to circumstances in which created remedies are inadequate. They dispensed with the notion that these remedies must provide equal relief as those given by a *Bivens* cause of action.

In addition to these restrictions, the Court also held in *FDIC v. Meyer*⁵⁴ that *Bivens* claims are not available against federal agencies.⁵⁵ A unanimous Court held that “an extension of *Bivens* to agencies of the

42. *Id.* at 22.

43. *Id.* at 23.

44. Mulligan, *supra* note 24, at 689.

45. *Id.* at 689 (writing that *Davis* and *Carlson* are the only two cases where *Bivens* claims for monetary damages against federal officers have been allowed.); *see also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001).

46. 42 U.S. 367 (1983).

47. *Bush*, 42 U.S. at 367.

48. *Id.* at 368.

49. *Id.* at 386-88.

50. 487 U.S. 412 (1988).

51. *Schweiker*, 487 U.S. at 425.

52. *Id.* at 417-19.

53. *Id.* at 423.

54. 510 U.S. 471 (1994).

55. *Meyer*, 510 U.S. at 486.

federal government is not supported by the logic of *Bivens* itself.”⁵⁶ Justice Thomas, writing for the majority, stated “[i]t must be remembered that the purpose of *Bivens* is to deter the officer.”⁵⁷

Similarly, in *Correctional Services Corporation v. Malesko*,⁵⁸ the Court considered whether a federal inmate may bring a *Bivens* claim against a privately run halfway house under contract with the Bureau of Prisons.⁵⁹ Mr. Malesko, who had a heart condition that entitled him to use an elevator to get to his fifth floor room, was forced by an employee to use the stairs.⁶⁰ He suffered a heart attack.⁶¹ In its decision, the Court, relying heavily on *Meyer*, held that the purpose of *Bivens*, is “to deter individual federal officers from committing constitutional violations.”⁶² Also, the Court reasoned that because prisoners in federal institutions are precluded from suing the Bureau of Prisons for constitutional violations, a *Bivens* claim would be inappropriate.⁶³ Finally, the Court held that the existence of alternative remedies through the Bureau of Prisons precluded a *Bivens* claim.⁶⁴ However, the Court also made note that state law tort claims were also available that are “unavailable to prisoners housed in [g]overnment facilities.”⁶⁵ This observation is especially surprising in light of *Bivens* and *Carlson*, which stated that state tort causes of action are insufficient to protect constitutional interests.⁶⁶

Thus, while *Bivens* created a cause of action for damages claims against federal officers for constitutional violations, subsequent decisions have limited its scope. In *Carlson*, the Court held that only an equally effective alternate remedy could prevent *Bivens*’ application.⁶⁷ Later, in *Bush* and *Schweiker*, the Court held that even comparatively incomplete remedies could bar a *Bivens* claim.⁶⁸ Similarly, in *Meyer* the Court held that *Bivens* claims are not available against federal agencies.⁶⁹ Finally, in *Malesko* the Court concluded that the existence of alternate causes of actions precluded *Bivens* from applying to suits against private organizations.⁷⁰ Thus, the next logical question is whether employees of private

56. *Id.*

57. *Id.* at 485.

58. 534 U.S. 61 (2001).

59. *Malesko*, 534 U.S. at 63.

60. *Id.* at 64.

61. *Id.*

62. *Id.* at 70; see also Mulligan, *supra* note 24, at 693 (characterizing this as the “no-entity-liability principle”).

63. *Malesko*, 534 U.S. at 71-72; see also Mulligan, *supra* note 24, at 694 (characterizing this as the “symmetry principle”).

64. *Malesko*, 534 U.S. at 74; see also Mulligan, *supra* note 24, at 694 (characterizing this as the “alternative-relief principle”).

65. *Malesko*, 534 U.S. at 72-73.

66. Mulligan, *supra* note 24, at 694 (describing the *Malesko* decision as “quite exceptional given [the Court’s] rulings in *Bivens* and *Carlson* . . .”).

67. *Carlson*, 446 U.S. at 18-19.

68. *Bush*, 42 U.S. at 368; *Schweiker*, 487 U.S. at 425.

69. *Meyer*, 510 U.S. at 486.

70. *Malesko*, 534 U.S. at 74.

organizations may be sued for constitutional violations under *Bivens*, a situation addressed in *Peoples v. CCA Detention Centers*.⁷¹

II. *PEOPLES V. CCA DETENTION CENTERS*

A. *Facts*

Mr. Peoples was a federal prisoner being held in a pretrial detention center in Leavenworth, Kansas.⁷² The center was run by Corrections Corporation of America (CCA), a for-profit corporation under contract with the U.S. Marshals Service.⁷³ When Mr. Peoples arrived at the detention center in July 2001, the Marshals Service directed CCA to hold him at the Leavenworth facility while he awaited trial in Missouri.⁷⁴ CCA placed Mr. Peoples in isolation for thirteen months.⁷⁵ Initially, Mr. Peoples was segregated for administrative reasons.⁷⁶ However, the Marshals Service and CCA determined that Mr. Peoples was an escape risk and continued to keep him segregated without telling him why he was being kept out of the general population.⁷⁷ In addition, he was not allowed a hearing on his segregation status for five months and did not have access to a law library.⁷⁸ He could, however, obtain legal materials through an attorney, though he was limited to cases for which he had exact citations.⁷⁹ In addition, Mr. Peoples believed that his phone calls to his attorneys were being monitored by CCA staff.⁸⁰

After thirteen months, Mr. Peoples was released into Pod-H of the general population.⁸¹ Once there, he began to file several informal and formal grievances to the CCA staff. In these complaints, he voiced his concerns that he would be physically assaulted by the Mexican Mafia gang, who were also in Pod-H, because of his affiliation with the Moorish Science Group.⁸² Nonetheless, CCA did not transfer him.⁸³ On the morning of August 1, 2001, the Mexican Mafia assaulted Mr. Peoples.⁸⁴ Again, he was not transferred.⁸⁵ Later that same day, the gang attacked

71. 422 F.3d 1090 (10th Cir. 2005).

72. *Peoples*, 422 F.3d at 1093.

73. *Id.*

74. *Id.*

75. *Id.* at 1094.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1093.

82. *Id.*; see also Brief for Appellant at 5, *Peoples v. CCA Detention Ctrs.*, 449 F.3d 1097 (10th Cir. 2004) (No. 04-3071).

83. *Peoples*, 422 F.3d at 1093.

84. *Id.*

85. *Id.* at 1093-94.

him again.⁸⁶ This time, however, they used padlocks, chains, and full soda cans.⁸⁷ After this attack, CCA transferred Mr. Peoples to Pod-A.⁸⁸

Mr. Peoples filed suit in the District of Kansas (*Peoples I*), alleging violations of his Eighth Amendment rights.⁸⁹ He sought punitive and compensatory damages and the court construed his claim to implicate a *Bivens* cause of action.⁹⁰ Citing *Malesko*, the court held that because "other remedies [were] available—including state negligence actions—the Supreme Court would not extend *Bivens* to private employees of government contractors."⁹¹ Accordingly, the court dismissed for lack of jurisdiction.⁹²

Mr. Peoples also filed a *Bivens* action in connection with his thirteen-month segregation and for his allegedly monitored phone calls (*Peoples II*).⁹³ The district court rejected the defendants' jurisdictional arguments.⁹⁴ Instead, the court found that "because the Tenth Circuit has not fully addressed the issue, the court will assume *arguendo* that a *Bivens* action against individual employees is available and will examine the sufficiency of the plaintiff's complaint."⁹⁵ The judge then granted all of the defendants' motions to dismiss.⁹⁶ Mr. Peoples appealed both rulings to the Tenth Circuit Court of Appeals.⁹⁷

B. The Majority Opinion

The Tenth Circuit, in a two-judge ruling (over a vigorous dissent from Judge Ebel), began by addressing whether the court had proper subject-matter jurisdiction.⁹⁸ The court held that Mr. Peoples' claims "easily [met] the basic requirements for federal-question jurisdiction" and thus both district courts had proper subject-matter jurisdiction.⁹⁹

Next, the court addressed whether a person may bring a *Bivens* claim against employees of a private prison.¹⁰⁰ After first discussing *Bivens* and its progeny, the court held that "there is no implied private right of action for damages under *Bivens* against employees of a private prison for alleged constitutional deprivations when alternative state or

86. *Id.* at 1094.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1094-95.

96. *Id.* at 1095.

97. *Id.* at 1094-95.

98. *Id.* at 1095.

99. *Id.* at 1095-96.

100. *Id.* at 1096.

federal causes of action for damages are available to the plaintiff.”¹⁰¹ The court based its holding on *Malesko*, which held “that the purpose of *Bivens* is only to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally [as in *Carlson*], or to provide a cause of action for a plaintiff who lacked *any alternative remedy* [as in *Davis*].”¹⁰²

The court then anticipated the argument that *Carlson* should control this case.¹⁰³ It distinguished between *Carlson* and Mr. Peoples’ claim by arguing that *Carlson* involved a situation where the FTCA allowed suit against the United States, but there was no cause of action against individual officers.¹⁰⁴ In other words, the cause of action against private individuals was “otherwise nonexistent.”¹⁰⁵ To buttress this reading of *Carlson*, the court admitted that it recognized the tension between *Carlson* and *Malesko*, but resolved to side with the last decided case.¹⁰⁶ In conclusion, the court held:

[A] *Bivens* claim should not be implied unless the plaintiff has no other means of redress or unless he is seeking an otherwise nonexistent cause of action against the individual defendant. Therefore, we will not imply a *Bivens* cause of action for a prisoner held in a private prison facility when we conclude that there exists an alternative cause of action arising under either state or federal law against the individual defendant for the harm created by the constitutional deprivation.¹⁰⁷

Accordingly, the court looked to whether Mr. Peoples could have brought his claims in Kansas courts to determine the existence of alternative causes of action.¹⁰⁸ For Mr. Peoples’ Eighth Amendment claims, the court found that Kansas law provides that the prison guards owe a duty to prevent “reasonably foreseeable injuries caused by fellow inmates” and therefore Mr. Peoples could have brought a negligence action against the individual guards.¹⁰⁹ Thus, because an alternative cause of action existed, Mr. Peoples’ Eighth Amendment *Bivens* claim could not be implied.¹¹⁰ In addition, the court found that Mr. Peoples’ Fifth Amendment claims regarding his thirteen-month segregation and lack of access to a law library did not rise to the level of a constitutional violation and were

101. *Id.* at 1101.

102. *Id.* (quoting *Malesko*, 534 U.S. at 70).

103. *Peoples*, 422 U.S. at 1101.

104. *Id.* at 1102.

105. *Id.*

106. *Id.*

107. *Id.* at 1103.

108. *Id.*

109. *Id.* at 1104. Actually, the court first looked to Kansas precedent in deciding that this is the proper duty owed to an inmate. *Id.*

110. *Id.* at 1105.

therefore properly dismissed under Rule 12(b)(6).¹¹¹ As to his allegation that his calls to his lawyer were being monitored, the court found that "Kansas law criminally prohibits third parties from unlawfully monitoring phone calls without the permission of at least one of the communicants."¹¹² Thus, because all of Mr. Peoples' claims could have either been brought under Kansas law or failed to state a claim, the court denied him relief.¹¹³

C. Judge Ebel's Concurrence and Dissent

Judge Ebel agreed that the court had proper subject matter jurisdiction.¹¹⁴ However, he believed that precedent, parallelism, uniformity, and deterrence demanded a *Bivens* cause of action for Mr. Peoples' claims.¹¹⁵ First, he argued that, contrary to the majority's opinion, the plaintiff in *Carlson* could have brought a state law tort claim.¹¹⁶ Specifically, he stated, "If a state tort suit brought against a federal employee is not a meaningful substitute for a constitutional right of action, then an identical suit brought against a private prison employee similarly should not be a meaningful substitute for a constitutional right of action."¹¹⁷ Second, he argued that the majority's opinion violates *Malesko*'s public and private symmetry principle because a prisoner in a governmentally-run prison may sue individuals but, according to the majority's opinion, a prisoner in a privately-run prison may not.¹¹⁸ Third, Judge Ebel criticized the majority for making *Bivens* remedies, which are constitutional in nature, contingent upon state laws.¹¹⁹ This results in a lack of uniformity that the *Carlson* Court sought to avoid.¹²⁰ Finally, he argued that the majority opinion undermines one of *Bivens*' primary goals, which is to deter individual officers from committing constitutional violations.¹²¹

111. *Id.* Federal Rule of Civil Procedure 12(b)(6) states:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

FED. R. CIV. P. 12(b)(6).

112. *Peoples*, 422 U.S. at 1108 (citing KAN. STAT. ANN. § 21-4002 (West 2005); *State v. Roudybush*, 686 P.2d 100, 108 (Kan. 1984)).

113. *Peoples*, 422 U.S. at 1108.

114. *Id.* (Ebel, J., dissenting).

115. *Id.* at 1108-13 (Ebel, J., dissenting).

116. *Id.* at 1109 (Ebel, J., dissenting).

117. *Id.* (Ebel, J., dissenting).

118. *Id.* at 1110-11 (Ebel, J., dissenting).

119. *Id.* at 1112-13 (Ebel, J., dissenting).

120. *Id.* at 1112 (Ebel, J., dissenting). Specifically, the Court stated "it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." *Carlson*, 446 U.S. at 23.

121. *Peoples*, 422 U.S. at 1113.

The Tenth Circuit reviewed Mr. Peoples' claims again in an en banc decision.¹²² The twelve-judge panel split evenly on whether a "*Bivens* action is available against employees of a privately-operated prison."¹²³ Thus, because there was no majority, the court vacated the Tenth Circuit's initial decision, and affirmed the district court's holding in *Peoples II*.¹²⁴

III. OTHER CIRCUIT DECISIONS THAT DISCUSS THE AVAILABILITY OF A *BIVENS* CLAIM AGAINST EMPLOYEES OF PRIVATE PRISONS

There is a split of authority about whether a *Bivens* claim may be brought against a private individual acting under federal authority.¹²⁵ Many of these cases have dealt with whether the private authority that employed the defendants was acting in concert with federal authority.¹²⁶ Importantly, these cases operate under the assumption that if the private entity and its employees are operating under the color of government authority, a *Bivens* action is appropriate. These cases support the idea that private actors may be sued under *Bivens* if they are acting as federal agents. In essence, these courts have looked at Mr. Peoples' claims from a different direction.

However, only three district courts and one other circuit court have determined whether a state law remedy precludes a *Bivens* claim against an employee of a privately-operated prison.¹²⁷ The District of Rhode Island is particularly divided. In the 2003 case *Sarro v. Cornell Corrections, Inc.*,¹²⁸ it held that a federal prisoner may bring a *Bivens* claim against employee-guardians of a private-prison operator.¹²⁹ Specifically, the court held that "a private party acting under color of federal law may be liable under *Bivens*."¹³⁰ In addition, the court was persuaded by the fact that "there is no manifestation of any Congressional intent to preclude

122. *Peoples v. CCA Detention Ctrs.*, 449 F.3d 1097 (10th Cir. 2006) (en banc).

123. *Peoples*, 449 F.3d at 1099.

124. *Id.* The Tenth Circuit en banc decision only upheld the district court's holding from *Peoples II* because the court in *Peoples I* held that it did not have subject matter jurisdiction and therefore never reached a decision on whether a suit could be brought against employees of privately-operated prisons. *Id.* at 1098.

125. CHEMERINSKY, *supra* note 11, at 610.

126. CHEMERINSKY, *supra* note 11 at 609-10. Compare *Kauffman v. Anglo-Am. Sch. of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994) (holding that school established in Bulgaria for American and British diplomats' children was not a federal agency and therefore exempt from *Bivens* liability), with *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698 (6th Cir. 1996) (holding that company's attorneys who had conducted a search with U.S. Marshalls at a competitor's premises were "federal agents"), and *Dobyns v. E-Sys.*, 667 F.2d 1219, 1225 (5th Cir. 1982) (holding that a government contractor whose peacekeeping mission was a "function which undoubtedly is traditionally exclusively reserved to the state" and therefore was subject to *Bivens* liability) (citation omitted). See also *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1333 n.3 (9th Cir. 1987) (holding that employee of government contractor could bring *Bivens* claims against private defendant because defendant was a "federal actor[]").

127. *Peoples*, 422 F.3d at 1100.

128. 248 F. Supp. 2d 52 (D.R.I. 2003).

129. *Id.* at 52.

130. *Id.* at 58.

courts from awarding damages to prisoners at privately-operated prisons for violations of their constitutional rights to the same extent that damages might be awarded to prisoners in publicly-operated prisons.”¹³¹ The *Sarro* court also addressed whether the plaintiff could have brought a § 1983 action against the defendants.¹³² The court held that because § 1983 requires a violation to be committed “under color of state law,” the plaintiff’s state action could not be allowed because “maintaining custody of *federal* prisoners is neither a power ‘possessed by virtue of *state* law’ nor one that has been ‘traditionally exclusively reserved to the state.’”¹³³ The court also looked to *Malesko*’s statement that the purpose of *Bivens* was “to deter individual federal officers from committing constitutional violations.”¹³⁴

A year and half later, in *Lacedra v. Donald W. Wyatt Detention Facility*,¹³⁵ a very similar claim came before another District of Rhode Island judge against the same defendants.¹³⁶ This time, however, the court held that the very same institution was a private corporation and found *Malesko* dispositive.¹³⁷ In the alternative, it held that “the individual prison guards at the Wyatt Facility carry out the traditional public function, derive their authority over the Plaintiff from state and, therefore, act under color of state law for purposes of § 1983.”¹³⁸ Thus, the guards were state actors who “had no federal authority to act.”¹³⁹

In addition to the *Sarro* court, the District of New Jersey also held that a federal prisoner may bring a *Bivens* claim against individual employees of a private company.¹⁴⁰ In *Jama v. U.S. Immigration and Naturalization Service*,¹⁴¹ the court was persuaded by the *Sarro* court’s reasoning that private-prison guards were “federal actors, performing public functions.”¹⁴² Also, the court found the *Sarro* court’s interpretation of *Malesko* to be persuasive: “[M]aking the federal remedies available to a prisoner at a privately-operated institution contingent upon whether there are adequate state law remedies . . . would cause the availability of a *Bivens* remedy to vary according to the state in which the institution is located, a result that *Bivens*, itself sought to avoid.”¹⁴³ However, it

131. *Id.* at 61.

132. *Id.* at 63-64.

133. *Id.* (citation omitted).

134. *Id.* at 62 (citation omitted).

135. 334 F. Supp. 2d 114 (D.R.I. 2004).

136. *Lacedra*, 334 F. Supp. 2d at 114. The Donald Wyatt Detention Facility is run by Cornell Corrections, Inc., the named defendant in *Sarro*. *Sarro*, 248 F. Supp. 2d at 52. The facility was a named defendant in the *Sarro* case. *Id.*

137. 334 F. Supp. 2d at 138. However, this part of the opinion seems to make no mention of the claims against the individual officers.

138. *Id.* at 142.

139. *Id.* at 141.

140. *Jama v. INS*, 343 F. Supp. 2d 338, 338 (D.N.J. 2004).

141. 343 F. Supp. 2d 338 (D.N.J. 2004).

142. *Jama*, 343 F. Supp. 2d at 362.

143. *Id.* at 362-63 (quoting *Sarro*, 248 F. Supp. 2d at 63).

should be noted that the *Jama* court made specific mention of the fact that a § 1983 action was unavailable.¹⁴⁴ Nonetheless, because the *Jama* court adopted *Sarro*'s reasoning, it can be assumed that it was also persuaded by *Sarro*'s holding that the private-prison guards are not acting "under color of" state law."¹⁴⁵

Only one other circuit court has directly addressed whether a prisoner may bring a damages claim against the individual guard employees of a privately-run prison.¹⁴⁶ In *Holly v. Scott*, the Fourth Circuit expressly adopted the *Peoples* court's reasoning.¹⁴⁷ The court stated that they agreed that "an inmate in a privately run federal correctional facility does not require a *Bivens* cause of action where state law provides him with an effective remedy."¹⁴⁸

IV. ANALYSIS

The debate about whether a prisoner is able to bring a *Bivens* claim for damages against officers in privately run prisons is only likely to intensify. In 2001, 12.3% of all federal prisoners were incarcerated in privately run prisons, and that number is likely to increase.¹⁴⁹ As more and more prisoners are incarcerated in private prisons, the instances of prisoner constitutional violation claims will also increase. Thus, this will be an issue that is likely to pervade our courts for the foreseeable future and ultimately must be resolved by the Supreme Court. The question, then, is how the Supreme Court should decide these claims. Should it side with the Tenth Circuit, and hold that the existence of a state law cause of action precludes a *Bivens* claim for damages? Or should it side with the *Sarro* court and Judge Ebel, and find that *Bivens* actions should be allowed in spite of the existence of a state law cause of action?

When *Bivens* and its progeny are viewed in their entirety and in light of their rationale, it is clear that the Supreme Court must rule in favor of allowing *Bivens* claims for damages against officers in privately-run prisons. First, the existence of state law causes of action do not provide the same remedies that federal causes of action for constitutional causes of action provide. Second, the Tenth Circuit's reliance on *Malesko* was unwarranted because the *Malesko* Court was operating on the assumption that claims against officers in privately-run prisons were permissible. Third, the purpose of *Bivens* and its progeny, as stated in *Malesko*, is to deter individual officers from committing constitutional

144. *Id.* at 361.

145. *Sarro*, 248 F. Supp. 2d at 64.

146. *Holly v. Scott*, 434 F.3d 287 (4th Cir. 2006).

147. *Holly*, 434 F.3d at 296.

148. *Id.*

149. Brief for Appellant, *supra* note 82, at 4 (citing PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN NCJ195189, PRISONERS IN 2001 1 (2002)).

violations. Fourth, as demonstrated by precedent and by the prior stipulation of CCA, officers in these private prisons are essentially government actors. Fifth, not allowing *Bivens* claims against officers in private prisons would have the anomalous result of allowing federal constitutional claims only when the offense was committed in a federal prison or if a privately-held prisoner brings a claim under a state cause of action. Finally, it is unlikely that an elected body can be relied upon to protect inmate constitutional rights and therefore it must fall to the courts.

A. State Law Causes of Action Provide Incomplete Remedies

The existence of a state law cause of action has never been dispositive in determining whether a *Bivens* cause of action is available.¹⁵⁰ In fact, *Bivens* and its progeny state the opposite. For example, in *Bivens*, the Court held that a federal cause of action was available "regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act"¹⁵¹ In fact, the defendant in *Bivens* argued that the existence of a state tort claim precluded the plaintiff from bringing a federal claim, but the Court held that state tort law might not provide an adequate remedy.¹⁵² In addition, in his concurrence, Justice Harlan stated that the availability of a federal remedy should not depend on where the violation occurs because this idea is "incompatible with the presumed availability of federal equitable relief."¹⁵³ In essence, this situation will provide for "inconsistent and uncertain" remedies for constitutional violations.¹⁵⁴ This concern was also present in *Carlson*, where the Court allowed a *Bivens* claim despite the existence of a state tort cause of action.¹⁵⁵ The Court stated that the "liability of federal agents for the violation of constitutional rights should not depend on where the violation occurred."¹⁵⁶ Prisoners should not have to depend on state law to provide a remedy for the abuse of federal power.

150. See *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090, 1109 (10th Cir. 2005) (Ebel, J., dissenting) ("A state tort cause of action (not predicated on a constitutional violation) is not an adequate alternative remedy for a constitutional violation."); see also Brief for Appellant, *supra* note 82, at 20 ("The district court's conclusion that state law tort remedies automatically provide a substitute for *Bivens* is incorrect . . .").

151. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

152. *Bivens*, 403 U.S. at 394-95.

153. *Id.* at 400 (Harlan, J., concurring); see also *Peoples*, 422 F.3d at 1112 (Ebel, J., dissenting) (arguing that under the majority's approach, a private-prison employee's liability will "depend on the varying contours of state law").

154. Brief for Appellant, *supra* note 82, at 24 (citing *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)).

155. *Carlson v. Green*, 446 U.S. 14, 18 (1980).

156. *Carlson*, 446 U.S. at 24; accord *Peoples*, 422 F.3d at 1109 (Ebel, J., dissenting) ("If the presence of a tort claim against individual officers was not sufficient to preclude a *Bivens* remedy against those officers in *Carlson*, so too should the availability of state-law tort claims against the instant defendants here be an insufficient substitute for the constitutional cause of action *Bivens* provides.").

Furthermore, state law tort claims are, by definition, related to state tort law. They do not implicate federal constitutional law. Without a *Bivens* cause of action, Mr. Peoples would be completely unable to bring a claim for the violation of one of his most fundamental rights, freedom from cruel and unusual punishment.¹⁵⁷ In addition, this difficulty is multiplied by the realities of our federal prison system. In many cases, state law remedies will be unable to provide a remedy for constitutional violations because most federal prisoners are transferred frequently and have limited access to lawyers.¹⁵⁸ This makes it very difficult for them to bring state law tort actions for a state in which they are no longer imprisoned.

Thus, Supreme Court precedent, the inherent inconsistency of state law, and the realities of our federal prison system virtually guarantee that state law remedies provide incomplete protection for inmate rights. As a consequence, the existence of a state law cause of action should not be a dispositive factor in determining whether a *Bivens* cause of action for damages against officers in private prisons should be allowed. Indeed, “[c]onstitutional rights cannot be adequately safeguarded by a patchwork of state tort law”¹⁵⁹

B. The Tenth Circuit’s Reliance on Malesko is Unwarranted

In *Peoples*, the Tenth Circuit based its holding on an incomplete consideration of *Malesko*, which held “that the purpose of *Bivens* is only to provide an otherwise nonexistent cause of action against *individual officers*”¹⁶⁰ In the end, the Court held that *Bivens* actions could not be maintained against private corporations. However, it is important to note that both parties in *Malesko* had assumed that a *Bivens* cause of action could be brought against the individual officers of a private corporation.¹⁶¹ In fact, this assumption formed the basis for the Court’s rationale for holding that the company that employed those officers could not be sued. The Court stated that if it held that the corporation could be sued, “claimants will focus their [attention] on it, and not the *individual*

157. Brief for Appellant, *supra* note 82, at 20-21; see also *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting) (“[I]t is true that a state-law tort remedy could be brought against the individual prison guards as to one of the claims, but perhaps not as to the other two claims which involve different conduct . . .”).

158. Brief for Appellant, *supra* note 82, at 21 n.5. See also *Peoples*, 422 F.3d at 1112 (Ebel, J., dissenting) (“Non-uniform rules of liability . . . do little to protect constitutional rights and may undermine the settled expectations of prisoners and prison guards, who may be transferred among different privately-run federal prison facilities located in different states.”).

159. Brief for Appellant, *supra* note 82, at 22.

160. *Peoples*, 422 F.3d at 1101 (majority opinion) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).

161. Brief for Appellant, *supra* note 82, at 14 (citing Brief for Petitioner at 13, *Malesko*, 534 U.S. 61 (2001) (No. 00-860) and Brief for Respondent at 8, 12, *Malesko*, 534 U.S. 61 (2001) (No. 00-860)); see also *Peoples*, 422 F.3d at 1110 (Ebel, J., dissenting) (stating that the Court in *Malesko* “clearly assumed the availability of a [*Bivens*] remedy against the employees of [the] prison.”).

directly responsible for the alleged injury.”¹⁶² Furthermore, Justice Stevens, in his dissent, stated that “the reasoning of the [majority] opinion relies, at least in part, on the availability of a remedy against employees of private prisons.”¹⁶³ In other words, the precedent heavily relied upon by the Tenth Circuit in *Peoples* actually assumed the opposite position, that officers in private corporations could be sued for damages under a *Bivens* claim. Thus, the Tenth Circuit’s reading of *Malesko* is limited at best, and ignores a fundamental assumption upon which the Court based its holding. Instead, the Tenth Circuit based its holding on peripheral language that clearly was not intended to be construed in a way that prevented inmates from bringing *Bivens* claims against individual officers in private prisons.¹⁶⁴ This is especially true given that both parties and the Court assumed that this was permissible.¹⁶⁵

C. Officers in Private Prisons Are Government Actors

In holding that a prisoner could bring a *Bivens* claim against officers of a private prison, the *Sarro* court recognized that the power to incarcerate people “whether done publicly or privately, is the exclusive prerogative of the state. This is a truly unique function and has been traditionally and exclusively reserved to the state . . . [this] function is not altered [if] the government contract[s] to have criminal defendants incarcerated at privately operated institutions.”¹⁶⁶ These guards serve the exact same function as their federal counterparts. They exercise the same uniquely governmental authority of depriving citizens of their right to liberty.¹⁶⁷ Principles of symmetry and consistency demand equal treatment of federally-run and privately-run prisons.¹⁶⁸

In addition, the D.C. district court has historically viewed CCA as a government actor when it is under contract with state governments or the District of Columbia.¹⁶⁹ Moreover, CCA’s officers have been sued for constitutional violations under 42 U.S.C. § 1983 actions, and in those cases CCA never argued that their officers were not government ac-

162. *Malesko*, 534 U.S. at 71 (emphasis added); see also Brief for Appellant, *supra* note 82, at 26.

163. *Malesko*, 534 U.S. at 79 n.6 (Stevens, J., dissenting); see also Brief for Appellant, *supra* note 82, at 26-27.

164. The Tenth Circuit based its holding on the phrase “otherwise nonexistent cause of action” in *Malesko*. *Peoples*, 422 F.3d at 1101 (majority opinion) (citing *Malesko*, 534 U.S. at 70). However, given that state law causes of action provide incomplete remedies for federal rights, a remedy for a constitutional violation is “otherwise nonexistent.”

165. See *supra* note 161 and accompanying text.

166. *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 61 (D.R.I. 2003) (citation omitted); see also *United States v. Thomas*, 240 F.3d 445, 448-49 (5th Cir. 2001) (holding that a guard at a private prison was a public official for the purposes of a federal bribery statute).

167. Brief for Appellant, *supra* note 82, at 12.

168. *Peoples*, 422 F.3d at 1110-11 (Ebel, J., dissenting) (criticizing the majority opinion as undercutting “the important policy objective of promoting public-private symmetry” of liability).

169. Brief for Appellant, *supra* note 82, at 13.

tors.¹⁷⁰ In fact, in one of its Supreme Court briefs, CCA even admitted that its employees were acting under color of state law.¹⁷¹ Thus, it is difficult to imagine why CCA would be a government actor in a state law scenario and not in a federal scenario. In fact, this situation is even more difficult to imagine if it is followed to its logical conclusion. If *Bivens* claims are not allowed against officers at private prisons, then causes of action for federal constitutional violations will be allowed when the prison contracts with a *state government* and will not be allowed when the prison contracts with the *federal government*.¹⁷²

D. Bivens' Central Goal of Deterrence is Severely Limited

As stated in *Malesko*, "*Bivens* from its inception has been based . . . on the deterrence of individual officers who commit unconstitutional acts."¹⁷³ Essentially, the purpose of *Bivens* is to prevent those exercising government authority from committing constitutional violations.¹⁷⁴ For example, in *Carlson*, the Court stated that "because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the government."¹⁷⁵ If *Bivens*' central goal is to deter individual officers, there is no reason why officers in privately-run prisons who are acting under color of federal law should be allowed to commit constitutional violations without the threat of a *Bivens* claim.¹⁷⁶ Deterring officers in privately-run prisons from committing constitutional violations is just as important as deterring officers in federal institutions.

In fact, it could be argued that deterring constitutional violations is even more vital in privately-run prisons. On average, private prisons have a staff-to-prisoner ratio 15% below public prisons.¹⁷⁷ This higher frequency of unsupervised prisoners might very well lead to a higher rate

170. *Id.* See generally *Beaudry v. Corrections Corp. of America*, 331 F.3d 1164 (10th Cir. 2003). See *supra* note 10 for a discussion of § 1983 litigation.

171. Brief for Appellant, *supra* note 82, at 13-14 (citing Brief of Petitioners at 19, *Richardson v. McKnight*, 521 U.S. 399 (1997) (No. 96-318)).

172. Brief of Appellant, *supra* note 82 at 14 (describing this situation as "untenable") (citation omitted).

173. *Malesko*, 534 U.S. at 71; see also *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter the officer.").

174. Brief for Appellant, *supra* note 82, at 15; see also *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting) (stating that individual deterrence is the "primary goal of a *Bivens* remedy").

175. *Carlson*, 446 U.S. at 21. The Court also stated that "[i]t is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." *Id.*

176. Brief for Appellant, *supra* note 82, at 16; see also *Peoples*, 422 F.3d at 1113 (Ebel, J., dissenting) ("[S]tate-law claim[s] may be more limited than would be a *Bivens* action. Accordingly, any deterrent value provided by individualized tort suits against private prison guards is significantly undercut.").

177. Brief for Appellant, *supra* note 82, at 18 (citing JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, BULLETIN NCJ 181249, EMERGING ISSUES ON PRIVATIZED PRISONS 52 (2001)).

of dangerous occurrences at these private prisons.¹⁷⁸ In addition, in order to maximize profits, private prisons accept more violent prisoners than their federal counterparts.¹⁷⁹ These factors translate to a higher risk of frequent, violent occurrences that will necessarily require guard and inmate conflicts. A *Bivens* cause of action is needed in these situations because of this higher potential for constitutional violations and in no event should the standard be lower for officers in privately-run institutions.

E. Not Allowing Bivens Claims for Officers in Private Prisons Will Produce Anomalous Results

If *Bivens* claims are not allowed against officers at private prisons, inconsistent situations will result. For example, guards at privately-run prisons under contract with state governments are liable for constitutional violations under 42 U.S.C. § 1983.¹⁸⁰ However, if *Bivens* claims are not allowed against employees of private prisons under contract with the federal government, then state officers will be subject to greater liability than federal officers in the area of constitutional violations.¹⁸¹ Clearly, not only is this unfair to victims at federally-contracted prisons, but also this is at odds with the idea of federalism.¹⁸² This result is even more bizarre in specific reference to CCA, which contracts with both state and federal governments.¹⁸³ To hold the same officers liable for constitutional violations only according to their employer's contract is strange at best, and at worst, patently affects the substantive constitutional rights of inmates.

In addition to the inconsistency that varies according to state and federal contracts, there is an anomaly between the liability of federal officers and private officers.¹⁸⁴ Simply stated, *Bivens* allows for an inmate to bring a claim for constitutional violations against a federal officer. However, in the Tenth Circuit, if a federal officer happens to be employed by a government contractor, that inmate has no remedy for constitutional violations. This inconsistency has no basis. Furthermore, in *Malesko*, the Court held that an important reason why prisoners could not sue private entities was that their federal counterparts were immune

178. Brief for Appellant, *supra* note 82, at 18.

179. See *id.* (citing Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 33 n.201 (2003)).

180. See *supra* note 10 for a discussion of § 1983 litigation.

181. Brief for Appellant, *supra* note 82, at 29; see also *Peoples*, 422 F.3d at 1111 (Ebel, J., dissenting) ("The Court . . . has recognized sound jurisprudential reasons for parallelism [between state and federal actor liability], as different standards for claims against state and federal actors would be incongruous and confusing.").

182. See Brief for Appellant, *supra* note 82, at 30 (quoting *Carlson*, 446 U.S. at 22 ("The 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression.")).

183. Brief for Appellant, *supra* note 82, at 30.

184. See *Peoples*, 422 F.3d at 1111 (Ebel, J., dissenting) (describing this as "public-private symmetry"); see also Brief for Appellant, *supra* note 82, at 31-32.

from suit.¹⁸⁵ Specifically, the Court argued that “no federal prisoners enjoy” the right to sue the organization that incarcerates them.¹⁸⁶ There is no reason for this symmetry to be disrupted when determining the liability of individual officers. Indeed, this may very well result in the federal government choosing to increase the number of prisoners held by private prisons because of the limited liability of officers employed privately.¹⁸⁷

F. If the Courts Don't Do It

The majority opinion in *Peoples* acknowledges and even agrees with the dissent's assertions that “there are certainly significant policy arguments that favor extending *Bivens* to the case at hand In our view, however, extending this judicially created remedy so that it more closely mirrors a statutory remedy is a decision best left for Congress.”¹⁸⁸ However, it seems highly unlikely that Congress as an elected body will ever want to answer to constituents about legislation that extends prisoner rights. The courts have historically played a role in the American system to safeguard of the rights of citizens that may not be able to protect themselves. However, because the majority agrees that there are significant reasons to allow a *Bivens* claim but then does nothing, it is certain that these policies will go unfulfilled.

CONCLUSION

Given the ever-increasing number of private prisons, the question of whether prisoners may sue employees of those prisons is one that will continue to plague our courts. Moreover, the important constitutional implications have led to strong opinions on both sides of the issue. The Supreme Court's inconsistent jurisprudence on the issue has led to confusion and that confusion will continue to create a division among the circuit courts on the issue. This will eventually lead to some circuits allowing *Bivens* claims for constitutional violations and some not. Because a scenario where prisoners will only be allowed to sue for constitutional violations based on where they are being held is untenable, the Supreme Court will need to determine whether a *Bivens* claim may be brought against employees of private prison corporations.

On a more local level, in *Peoples*, the Tenth Circuit severely limited the rights of inmates. This decision has far-reaching constitutional implications. Unfortunately, given *Bivens* and its progeny's ultimate goal, deterrence, these implications were not intended by the Supreme Court. In fact, the case relied on most heavily by the Tenth Circuit, *Malesko*, actually supports the conclusion that *Bivens* claims should be allowed

185. *Malesko*, 534 U.S. at 71-72; see also Brief for Appellant, *supra* note 82, at 31-32.

186. *Malesko*, 534 U.S. at 71-72.

187. See Brief for Appellant, *supra* note 82, at 30.

188. *Peoples*, 422 F.3d at 1103 (majority opinion).

against officers in private prisons. In addition, the Tenth Circuit's decision will produce anomalous results because not only will employees of state-run prisons be subject to greater liability for constitutional violations than their federal counterparts, but also employees of federal prisons will be subject to greater liability than employees of federally-contracted private prisons. Finally, instead of safeguarding the rights of those without the power to do so, the Tenth Circuit urged Congress, a political body, to pass legislation. Given these powerful reasons for allowing *Bivens* claims against officers at private prisons, combined with the majority's hesitation in not allowing these claims, it is likely that this decision will be revisited many times in the future

*Erik Lemmon**

* J.D. Candidate, 2008, University of Denver Sturm College of Law. I would like to thank Professor Kaplan and Professor Moffat for their assistance in preparing this comment and my wife, Laura, for her tireless support.

ENGLISH-ONLY POLICIES IN THE WORKPLACE: DISPARATE IMPACT COMPARED TO THE EEOC GUIDELINES

INTRODUCTION

According to the 2000 census, in the United States between 1990 and 2000 the foreign-born population increased by more than half.¹ The 2000 census also revealed that forty-seven million people speak a language other than English at home.² The number of employees who speak a foreign language at work has also increased substantially.³ In order to combat problems associated with this increase, such as effective supervision, safety, efficiency, and workplace disruptions,⁴ employers are implementing English-only policies. English-only policies prohibit speaking any language except English during some or all of the work day. The Equal Employment Opportunity Commission ("EEOC") reports that the increased use of these policies by employers led to quintuple complaints by employees alleging discrimination on the basis of English-only rules between 1996 and 2000.⁵

These complaints have arisen because language is a part of national origin, which is protected under Title VII. While protection arises under Title VII, there is a split between the Ninth Circuit and the Tenth Circuit over how to analyze cases concerning discrimination based on national origin as a result of English-only policies. This split highlights competing values: the value of language as a part of a person's national origin and the value of an employer's freedom in determining how to run his or her business safely and efficiently.⁶

In addressing these competing values, there are two possible approaches: 1) the EEOC Guidelines; and 2) disparate impact analysis. The EEOC Guidelines presume English-only policies lead to discrimina-

1. Nolan Malone, Kaari F. Baluja, Joseph M. Costanzo & Cynthia J. Davis, *The Foreign-Born Population: 2000*, Census 2000 Brief, 2, available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> ("Between 1990 and 2000, the foreign-born population increased by 57 percent, from 19.8 million to 31.1 million, compared with an increase of 9.3 percent for the native population and 13 percent for the total U.S. population.").

2. Hyon B. Shin & Rosalind Bruno, *Language Use and English-Speaking Ability: 2000*, Census 2000 Brief, at 2, available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> ("The number and percentage of people in the United States who spoke a language other than English at home increased between 1990 and 2000. In 2000, 18 percent of the total population aged 5 and over, or 47.0 million people, reported they spoke a language other than English at home.").

3. See Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265, 267 (1990).

4. See *id.* at 305-16.

5. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 81 (2d ed. 2001).

6. Perea, *supra* note 3, at 315 ("[E]mployers may be able to justify English-only rules that are not unduly discriminatory, based on safety and efficiency.").

tion in the workplace.⁷ In contrast, the disparate impact analysis requires the employee to carry the initial burden of proving the policy led to discrimination or harm.⁸

The Ninth Circuit has been the leading source of case law on the issue of English-only policies. In 1993, the Ninth Circuit explicitly rejected the EEOC guidelines and applied a disparate impact analysis to find that an employer did not discriminate based on an English-only policy.⁹ This was the controlling decision on English-only policies until a 2006 decision from the Tenth Circuit in *Maldonado v. City of Altus*.¹⁰ The Tenth Circuit decision departed from the current law in the Ninth Circuit by not explicitly rejecting or adopting the EEOC guidelines on English-only policies.¹¹ Rather, the Tenth Circuit discussed the EEOC guidelines and also applied a disparate impact analysis to find that summary judgment for the employer was not appropriate.¹²

The split between the Ninth and the Tenth Circuit is important because it shows that there is a conflict over what analysis, the EEOC guidelines or disparate impact, courts should utilize in considering English-only policies. It is imperative that the courts use one analysis or the other because applying both creates confusion over what policies employers can implement without violating the law and what rights employees have to speak a foreign language in the workplace. The disparate impact analysis should be applied, not the EEOC guidelines, because disparate impact balances the importance of language with the importance of allowing employers to run safe and efficient businesses; and a disparate impact analysis is also consistent with legislative intent.

Part I of this comment addresses the disparate treatment and disparate impact analyses used for claims arising under Title VII. Part I also reviews the EEOC guidelines and their treatment of English-only policies. Part II of this comment explores the Ninth Circuit decisions regarding challenges to English-only policies. Part III discusses the lower courts' decisions and provides a detailed review of *Maldonado*. Part IV analyzes the disparate impact approach and the EEOC guidelines and argues that the disparate impact approach properly balances the rights of employers and employees, unlike the EEOC guidelines, because disparate impact protects language as a part of national origin, while also allowing employers to run safe and efficient businesses. Part IV also argues that the disparate impact approach is consistent with the legislative intent of Title VII.

7. 29 C.F.R. § 1606.7 (West 2007).

8. *Maldonado v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006).

9. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993).

10. *Maldonado*, 433 F.3d at 1305.

11. *Id.*

12. *Id.* at 1306.

I. BACKGROUND

Claims based on national origin arise under Title VII, which requires either a disparate treatment or a disparate impact analysis. The EEOC, in contrast, has specific guidelines for addressing discrimination claims as a result of English-only policies.

A. Title VII

Under Title VII § 2000e-2(a):

It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹³

Courts and legal commentators assert that speaking a foreign language may make someone a protected group member based on national origin.¹⁴ Therefore, claims concerning English-only policies fall under Title VII as either disparate treatment claims or disparate impact claims based on national origin.¹⁵ In the employment context, disparate treatment protects employees against employment practices or policies involving intentional discrimination, while disparate impact protects employees against policies or practices that are substantively neutral, but lead to discrimination in practice.

1. Disparate Treatment

Disparate treatment applies when an employer intentionally discriminates against an employee, usually through an employment action such as hiring, firing or an employment policy, because that employee is a protected group member based on race, color, religion, sex, or national origin under Title VII.¹⁶ The Supreme Court set out a method for proving disparate treatment in *McDonnell Douglas Corp. v. Green*.¹⁷ First, the Court determined that the plaintiff employee bears the initial burden of proof in a disparate treatment claim.¹⁸ If that burden is satisfied, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment action or policy.¹⁹ If the em-

13. 42 U.S.C.A. § 2000e-2(a)(2) (West 2007).

14. Brief for American Civil Liberties Union of Oklahoma Foundation as Amici Curiae Supporting Appellants at 6, *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) (No. 04-6062) [hereinafter Brief for ACLU] ("Courts have long recognized that an individual's primary language is a trait closely tied to national origin."); Wayne N. Outten & Kathleen Peratis, *National Origin Discrimination*, 676 PLI/Lit 291, 299-300, 318-23 (2002); Perea, *supra* note 3, at 274-79.

15. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1484 (9th Cir. 1993).

16. *Spun Steak*, 998 F.2d at 1484.

17. 411 U.S. 792, 802-04 (1973).

18. *McDonnell Douglas*, 411 U.S. at 802.

19. *Id.*

ployer succeeds, the burden shifts back to the employee to show that the employer's nondiscriminatory reason for the employment decision or policy is a pretext for discrimination.²⁰

The underlying theory of disparate treatment is that a policy or employment decision is discriminatory when an employer treats an employee differently "because of" race, color, religion, sex, or national origin, the protected characteristics covered by Title VII.²¹ In *Hazen Paper Company v. Biggins*,²² the Supreme Court decision turned on whether an employee was terminated *because of* his age in violation of the Age Discrimination in Employment Act (ADEA) or if the employee was terminated because his pension was about to vest, which while illegal, did not violate the ADEA.²³ The Court concluded that even if the reason for the employment action, firing the employee to prevent his retirement plan from vesting, was "correlated with" his age, the correlation was not enough to prove discrimination "because of" age.²⁴

Challenges to English-only policies usually involve policies that require all groups to speak English.²⁵ Even though this type of policy may *correlate to* national origin, because it treats all employees the same way and does not single out employees *because of* national origin, the policy will not ordinarily lead to disparate treatment. In order to prove that an employer implemented an English-only policy *because of* an employee's national origin, the policy would have to be drafted to require "members of one national origin group to speak English while allowing members of another national origin group to speak another language."²⁶ An English-only policy will usually not be drafted this way. Instead, an English-only policy is more likely to require all employees to speak English, which is substantively neutral,²⁷ but may have a disparate impact on non-English speaking employees in practice.

2. Disparate Impact

The disparate impact burden-shifting analysis was established in 1971 in the case of *Griggs v. Duke Power Company*.²⁸ The key difference between disparate treatment and disparate impact is that disparate treatment addresses a policy with a discriminatory intent, while disparate impact addresses a policy that leads to discrimination in practice.²⁹

20. *Id.* at 804.

21. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

22. *Hazen*, 507 U.S. at 604.

23. *Id.* at 609-11.

24. *Id.* at 611.

25. LEWIS & NORMAN, *supra* note 5, at 80.

26. David T. Wiley, Note, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539, 549 (1995).

27. LEWIS & NORMAN, *supra* note 5, at 80 ("[E]mployer practices or rules based on language characteristics will usually . . . be neutral on their face.").

28. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-33 (1971).

29. *Spun Steak*, 998 F.2d at 1484.

Twenty years later, the Civil Rights Act of 1991 ("1991 Act") reaffirmed that the standard outlined by *Griggs* is the standard that should be applied in disparate impact cases.³⁰

The *Griggs* disparate impact analysis has four parts. First, the plaintiff employee must identify a discriminatory practice, which in the context of this paper is an English-only policy.³¹ Second, the plaintiff employee must show that the practice has a discriminatory impact in operation, regardless of the employer's intent.³² To show this discriminatory impact, the employee may not simply claim that the policy harmed members of his or her protected class.³³ The employee must prove that the "terms, conditions, or privileges of employment" were denied to the protected class and that this was a significant harm that did not affect employees that were not part of the protected class.³⁴ Third, the employer may show business necessity as an affirmative defense.³⁵ The Court in *Griggs* emphasized that in a disparate impact analysis "[t]he touchstone is business necessity" because "good intent or absence of discriminatory intent does not redeem employment procedures."³⁶ To protect employees from the "consequences of employment practices, not simply the motivation," the *Griggs* Court found that there must be a business necessity to justify an employment policy or procedure that discriminates in practice.³⁷

While the description of business necessity from the *Griggs* case is ambiguous, the 1991 Act affirmed that under *Griggs* the employer had the burden of proof to show business necessity as an affirmative defense "to justify a practice shown to have a disparate impact."³⁸ The 1991 Act stated that "statistical reports, validation studies, expert testimony, [or] prior successful experience" may prove business necessity.³⁹ Despite the lack of a clear definition of business necessity, the burden lies with the employer to show business necessity once an employee proves a policy creates a disparate impact.

Finally, if the employer proves business necessity the burden shifts back to the plaintiff employee who can still prove a Title VII violation by showing there is a lesser discriminatory alternative to the English-only

30. 42 U.S.C.A. § 2000e-2(k) (West 2007); H.R. REP. NO. 102-40(I), at 24 (1991) ("In *Griggs* and its progeny, the courts fashioned a workable and widely accepted set of legal principles for resolving the problems caused by employment practices which, while neutral on their face, disproportionately exclude qualified workers on the basis of their sex, national origin, race or religion.").

31. *Griggs*, 401 U.S. at 431.

32. *Id.*

33. *Spun Steak*, 998 F.2d at 1486.

34. *Id.*

35. *Griggs*, 401 U.S. at 431.

36. *Id.* at 431-32.

37. *Id.* at 432.

38. H.R. REP. NO. 102-40(I), at 28 (1991).

39. *Id.*, at 38.

policy.⁴⁰ The employee can prove this by showing that another method would serve the employer's purposes without the disparate impact of the current practice.⁴¹ For example, if an employer requires all potential job applicants without a high school diploma to pass a standardized test to be considered for a job and the test excludes a particular race, the employee may show there are other tests or methods of selecting viable job applicants as a less discriminatory alternative.⁴²

In *Personnel Administrator of Massachusetts v. Feeney*,⁴³ the Supreme Court found that a statute requiring a hiring preference for veterans, which excluded mostly women, was not discriminatory based on sex because all non-veterans, male and female alike, were equally burdened by the statute.⁴⁴ A policy has a disparate impact when it places a group protected under Title VII at a relative disadvantage, not when it places protected and non-protected groups alike at a disadvantage.⁴⁵

Under an English-only policy requiring all employees to speak English without exception, employees are treated equally for the purposes of disparate treatment analysis and are not entitled to recover for discrimination.⁴⁶ However, because non-English speakers may be alienated from the English speakers and placed at a disadvantage in practice, disparate impact analysis provides a promising alternative for proving discrimination. While facially neutral, these policies have a more burdensome effect on persons of particular national origins.⁴⁷ Accordingly, most claims regarding English-only policies should require a disparate impact analysis.

B. EEOC Guidelines

The EEOC guidelines recommend different burdens specifically for cases dealing with English-only policies.⁴⁸ First, the EEOC guidelines state that an English-only policy "requiring employees to speak only English at all times" creates a presumption that the policy violates Title VII.⁴⁹ Second, the guidelines address English-only policies applied only at certain times.⁵⁰ An employer may show that the policy is "justified by business necessity" under the guidelines only if the English-only policy is limited to specific periods during the workday.⁵¹ Finally, there must

40. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 376-77 (1988).

41. H.R. REP. NO. 102-40(I), at 42 (1991).

42. See *Griggs*, 401 U.S. at 431-33; PLAYER, *supra* note 40, at 376-77.

43. 442 U.S. 256 (1979).

44. *Feeney*, 442 U.S. at 275.

45. See *id.*

46. See *Spun Steak*, 998 F.2d at 1486.

47. See *Maldonado*, 433 F.3d at 1298; *Spun Steak*, 998 F.2d at 1483; *Gutierrez v. Mun. Ct.*, 838 F.2d 1031, 1036 (9th Cir. 1988).

48. 29 C.F.R. § 1606.7 (2007).

49. *Id.*

50. *Id.*

51. *Id.*

be notice of the English-only policy or any employment action taken against an employee based on the policy will be considered evidence of a Title VII violation.⁵²

II. THE NINTH CIRCUIT

While many lower courts have considered English-only policies in the workplace since the enactment of the EEOC guidelines, the Ninth Circuit has been the leading source of case law on the issue.⁵³

A. *Jurado v. Eleven-Fifty Corporation*⁵⁴

A radio disc jockey was fired when he refused to comply with an English-only order from his employer to alter his radio personality by eliminating the "street Spanish" used in his program.⁵⁵ The employer decided to eliminate Spanish because the show was not attracting the Hispanic demographic.⁵⁶

The Ninth Circuit primarily applied a disparate treatment analysis.⁵⁷ The court found that the radio station did not have a discriminatory motive for ordering an English-only approach on the radio show.⁵⁸ The court found the decision was made strictly based on the radio station's attempt to attract listeners.⁵⁹ Therefore, the court concluded summary judgment for the employer was properly granted.⁶⁰

The court briefly discussed the employee's disparate impact claim, citing *Griggs* for the requirement that the employee has the burden of establishing a prima facie disparate impact case.⁶¹ The court concluded that the lower court properly decided that the policy did not "disproportionately disadvantage" Hispanics and, therefore, the employee did not establish a prima facie case.⁶²

B. *Gutierrez v. Municipal Court*⁶³

The Municipal Court in Los Angeles employed bilingual deputy court clerks to translate for the Spanish speaking public.⁶⁴ The Municipal Court put a policy into place requiring English-only at all times during the work day, unless employees were translating for a member of the

52. *Id.*

53. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1480 (9th Cir. 1993), *Gutierrez v. Mun. Ct.*, 838 F.2d 1031, 1031 (9th Cir. 1988), *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1406 (9th Cir. 1987).

54. 813 F.2d 1406 (9th Cir. 1987).

55. *Jurado*, 813 F.2d at 1408.

56. *Id.*

57. *Id.* at 1409.

58. *Id.* at 1410.

59. *Id.*

60. *Id.* at 1411.

61. *Id.* at 1412.

62. *Id.*

63. 838 F.2d 1031 (9th Cir. 1988).

64. *Gutierrez*, 838 F.2d at 1036.

public.⁶⁵ Originally, this policy did not include breaks, but it was extended so that English was required during lunch and breaks.⁶⁶

The Ninth Circuit reviewed the preliminary injunction issued by the district court to prevent employers from enforcing the English-only policy.⁶⁷ After establishing that "language is an important aspect of national origin" and discussing the requirements from the EEOC guidelines, the court adopted the EEOC's "business necessity test."⁶⁸ The court also went on to find that "[t]here can be no doubt that the use of disparate impact analysis is appropriate here."⁶⁹ The court affirmed that the English-only policy created a disparate impact because "the prohibition on intra-employee communications in Spanish is sweeping in nature and has a direct effect on the general atmosphere and environment of the work place."⁷⁰ Next, the court found that all of the business necessities presented by the employer were not adequate, including the justifications that the United States is an English speaking country and California is an English speaking state; permitting Spanish to be spoken by employees outside of their work duties is disruptive; the policy promotes racial harmony; and supervisors do not speak or understand Spanish.⁷¹ Consequently, the court concluded that the injunction was proper.⁷²

C. *Garcia v. Spun Steak*⁷³

An English-only policy was implemented by the employer, a poultry and meat products producer, to promote racial harmony, improve worker safety, and facilitate better supervision.⁷⁴ The policy allowed employees to speak Spanish during breaks and excluded employees who did not speak English.⁷⁵ Two bilingual employees, production line workers for the company, received warning letters when they violated the policy and were no longer allowed to work next to each other.⁷⁶

In contrast to the Ninth Circuit's decision in *Gutierrez*, the Ninth Circuit in *Spun Steak* explicitly rejected the EEOC guidelines and applied a disparate impact analysis.⁷⁷ The court reasoned that the EEOC guidelines failed to achieve a balance between the employer's freedom to

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1039-40.

69. *Id.* at 1040.

70. *Id.* at 1041.

71. *Id.* at 1041-44.

72. *Id.* at 1045.

73. 998 F.2d 1480 (9th Cir. 1993).

74. *Spun Steak*, 998 F.2d at 1483.

75. *Id.*

76. *Id.*

77. *Id.* at 1489.

run a business and the prevention of discrimination, which was inconsistent with the legislative intent of Title VII.⁷⁸

The court also noted that while the facts in the case did not show a Title VII violation:

Whether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate. The dynamics of an individual workplace are enormously complex; we cannot conclude, as a matter of law, that the introduction of an English-only policy, in every workplace, will always have the same effect.⁷⁹

Under the disparate impact analysis, the court concluded that the employees did not establish a prima facie case.⁸⁰ The court emphasized that there was no evidence that the policy created a hostile working environment.⁸¹ The court also noted that the employees did not have a right to self-expression in the workplace, and as bilingual speakers they were only inconvenienced by the policy.⁸² Finally, the court concluded that even though the bilingual employees did not establish a prima facie case, the case for monolingual employees was remanded to consider if the policy created a disparate impact on those employees.⁸³

III. TENTH CIRCUIT

The district courts in the Tenth Circuit did not follow the lead of the Ninth Circuit. Likewise, the Tenth Circuit failed to take a definitive stance on the EEOC guidelines or the disparate impact analysis.

A. Lower Court Decisions Leading up to Maldonado

The decisions of the district courts in the Tenth Circuit leading up to *Maldonado v. City of Altus*,⁸⁴ failed to embrace either the disparate impact analysis or the EEOC guidelines.⁸⁵

In *Tran v. Standard Motor Products*,⁸⁶ employees alleged an English-only policy that was applied during employee-supervisor meetings and while employees were working violated Title VII.⁸⁷ The district court analyzed the issue on the premise that while the Tenth Circuit had

78. *Id.* at 1489-90.

79. *Id.* at 1489 (responding to the employees' request for the court to adopt a per se rule that English-only policies always create a hostile working environment).

80. *Id.* at 1490.

81. *Id.* at 1489.

82. *Id.* at 1487-88.

83. *Id.* at 1490.

84. 433 F.3d 1294 (10th Cir. 2006).

85. *Barber v. Lovelace Sandia Health Sys.*, 409 F. Supp. 2d 1313, 1327-28 (D.N.M. 2005), *Olivarez v. Centura Health Corp.*, 203 F. Supp. 2d 1218, 1224-25 (D. Colo. 2002), *Tran v. Standard Motor Products Inc.*, 10 F. Supp. 2d 1199, 1210-11 (D. Kan. 1998).

86. 10 F. Supp. 2d 1199 (D. Kan. 1998).

87. *Tran*, 10 F. Supp. 2d at 1202.

“not addressed the issue” of the EEOC guidelines, the guidelines “offer some guidance.”⁸⁸ Based on this, the court found that the business necessities given by the employer including: “(1) to ensure that all employees and supervisors could understand each other during cell meetings; (2) to prevent injuries through effective communication on the production floor; and (3) to prevent non-Vietnamese employees from feeling as if they were being talked about by Vietnamese employees” did prove legitimate business necessities for the policy.⁸⁹ The court also found that even if these were not business necessities, the employee did not prove that the policy led to discrimination or “adversely affected his employment in any way.”⁹⁰ Therefore, the court upheld summary judgment for the employer.⁹¹ However, the court pointed out that the analysis was fact-based and “the court does not foreclose the possibility that in some circumstances, an English-only policy may constitute a violation of Title VII.”⁹²

The court in *Olivarez v. Centura Health Corporation*⁹³ similarly skirted the issue of the EEOC Guidelines.⁹⁴ An employee, unsatisfied with the way the employer handled his complaints of discrimination, quit his job and alleged disparate treatment under Title VII, in part because of a policy prohibiting Spanish.⁹⁵ Here, the district court did not adopt or reject the EEOC guidelines, even though the employer relied on the EEOC guidelines to prove business necessity.⁹⁶ Instead the court, granting summary judgment for the employer, simply stated the employee did not show that the English-only policy “resulted in a job detriment to him.”⁹⁷

Like in *Tran* and *Olivarez*, the court in *Barber v. Lovelace Sandia Health Systems*⁹⁸ also declined to definitively adopt or reject the EEOC guidelines, but still considered the guidelines while analyzing the English-only policy.⁹⁹ The employer, Lovelace, a New Mexico health care provider, announced the implementation of an English-only policy at a staff meeting at one of its facilities.¹⁰⁰ Two bilingual employees, working at the Lovelace facility at the time, felt they were carefully scrutinized to make sure they were not using Spanish after the policy was im-

88. *Id.* at 1210.

89. *Id.*

90. *Id.* at 1211.

91. *Id.*

92. *Id.* at 1211 n.18.

93. 203 F. Supp. 2d 1218 (D. Colo. 2002).

94. *See Olivarez*, 203 F. Supp. 2d at 1224-25.

95. *Id.* at 1220-21, 1223.

96. *See id.* at 1224.

97. *Id.* at 1225.

98. 409 F. Supp. 2d 1313 (D.N.M. 2005).

99. *See Barber*, 409 F. Supp. 2d at 1327-28.

100. *Id.* at 1319.

plemented.¹⁰¹ One employee resigned and the other was transferred to another Lovelace clinic.¹⁰² The district court stated that in analyzing the case it would presume that the Tenth Circuit would give deference to the EEOC guidelines and presume that the employees established a prima facie case of disparate treatment.¹⁰³ Under these assumptions, the court found that the employer had a “legitimate and non-discriminatory reason for the policy.”¹⁰⁴ Therefore, the court granted summary judgment for the employer.¹⁰⁵

All of these cases show that the lower courts did not want to adopt or reject the EEOC guidelines without guidance from the Tenth Circuit.¹⁰⁶ However, instead of offering guidance, the Tenth Circuit failed to clarify this confusion by embracing a disparate impact analysis and referencing the EEOC guidelines in an opinion considering an English-only policy.¹⁰⁷

*B. Maldonado v. City of Altus*¹⁰⁸

In 2002, the City of Altus, Oklahoma, established an English-only policy.¹⁰⁹ The policy required City employees to speak English for all “work related and business communications during the work day.”¹¹⁰ However, the policy allowed employees to communicate with a Spanish speaking “citizen, business owner, organization or criminal suspect” in Spanish, and the policy did not apply during lunch, breaks, or when employees were involved in personal conversations.¹¹¹ The policy also allowed employees with limited English skills to “discuss the situation with the department head and the Human Resources Director to determine what accommodation is required and feasible.”¹¹²

Once the written policy was established, the employees claimed that in practice the policy was more expansive than the written requirements specified.¹¹³ The employees asserted that the policy restricted them from speaking Spanish whenever a non-Spanish speaker was present, including during breaks and on the phone.¹¹⁴ The employees also complained that they were teased by non-Spanish speaking employees about the Eng-

101. *Id.* at 1320.

102. *Id.* at 1324-25.

103. *Id.* at 1335-36.

104. *Id.* at 1337-38.

105. *Id.* at 1334.

106. *See id.* at 1334-35; *Olivarez v. Centura Health Corp.*, 203 F. Supp. 2d 1218, 1224-25 (D. Colo. 2002); *Tran v. Standard Motor Prod., Inc.*, 10 F. Supp. 2d 1199, 1210 (D. Kan. 1998).

107. *Maldonado v. City of Altus*, 433 F.3d 1294, 1303-06 (10th Cir. 2006).

108. 433 F.3d 1294 (10th Cir. 2006).

109. *Maldonado*, 433 F.3d 1294 at 1299-1300.

110. *Id.* at 1299.

111. *Id.*

112. *Id.*

113. *Id.* at 1300.

114. *Id.*

lish-only policy.¹¹⁵ The City's Street Commissioner was aware of the tension the policy created because he told one of the Spanish speaking employees that "he was informing them of the English-only policy in private because [he] had concerns about 'the other guys making fun of [them].'"¹¹⁶

The employer claimed the policy was put in place to facilitate effective radio communication on the city radios, to address complaints that non-Spanish speaking coworkers felt uncomfortable when Spanish speaking employees were "speaking in front of them in a language they could not understand," and to increase safety around heavy equipment.¹¹⁷ The EEOC tried to resolve the dispute over the policy and was unsuccessful.¹¹⁸ The district court granted summary judgment and dismissed all of the employee's claims, including the claim that Title VII was violated under a disparate impact and a disparate treatment analysis.¹¹⁹

The Tenth Circuit considered a claim of discrimination based on national origin under Title VII, in addition to several other claims not arising under Title VII.¹²⁰

The court addressed the employees' Title VII claim using a disparate impact analysis. First, the court began by confirming that an English-only policy may qualify as national origin discrimination.¹²¹ The court also established that the employees did not have to prove discriminatory intent; they just had to prove that the policy led to disparate impact, in this case by creating a hostile working environment for Hispanics based on the English-only policy.¹²² Second, the court explained that once an employee establishes disparate impact, the employer has the burden to show business necessity as articulated by the Supreme Court in *Griggs*.¹²³

The court analyzed the employee's prima facie case, explaining that when determining if there is enough harm to establish a prima facie case of disparate impact, each English-only policy case "turns on its facts." The court cited the teasing and the extension of the English-only policy into breaks, lunch hours, and private phone calls as evidence "that the English-only policy creates a hostile atmosphere for Hispanics in their workplace."¹²⁴

115. *Id.* at 1301.

116. *Id.*

117. *Id.* at 1300.

118. *Id.* at 1301.

119. *Id.* at 1302.

120. *Id.* at 1298 (discussing all the claims brought by the plaintiffs including equal protection claims, a claim of retaliation, and a claim that the First Amendment was violated by the policy).

121. *Id.* at 1303.

122. *Id.* at 1303-04.

123. *Id.* at 1304.

124. *Id.*

Next, the court considered the EEOC guidelines. The court hesitated to make a decision on the effect of the guidelines, pointing out that while the Ninth Circuit rejected the guidelines altogether, the decision in this case only required the court to find that the EEOC was reasonable on the matter so it would not be “unreasonable for a juror to agree that the City’s English-only policy created a hostile work environment for its Hispanic employees.”¹²⁵ In its final conclusion, the Tenth Circuit did not adopt the EEOC guidelines stating:

[W]e are not suggesting that the guideline is evidence admissible at trial or should be incorporated in a jury instruction. What we are saying is only that a juror presented with the evidence presently on the record in this case would not be unreasonable in finding that a hostile work environment existed.¹²⁶

The court also found that a reasonable person may find there was not a business necessity for the English-only policy, so summary judgment for the employer was not appropriate.¹²⁷

Finally, the court found summary judgment on the disparate treatment claim was not proper because the employees had evidence of a hostile work environment, which may show the employer’s intent to discriminate.¹²⁸

IV. ANALYSIS

There is value in language as a reflection of culture and ethnicity, but there is also value in allowing employers to run their businesses safely and effectively. The disparate impact analysis under Title VII balances these values and is also consistent with the legislative intent of Title VII.

A. Problems with the EEOC Guidelines

The contrast between the EEOC guidelines and a disparate impact analysis illustrates the problems with applying the guidelines. The EEOC guidelines differ from a disparate impact analysis because they create a presumption that English-only policies discriminate based on national origin without requiring proof of discrimination.¹²⁹ Unlike disparate impact, once there is evidence proving an employer implemented an English-only policy at all times or only at certain times, an employee is relieved of any burden of proving the policy led to discrimination or

125. *Id.* at 1305-06.

126. *Id.* at 1306.

127. *Id.* at 1307.

128. *Id.* at 1308; *see also id.* at 1298 (reversing summary judgment on the intentional discrimination and equal protection claims and affirming summary judgment on the remaining claims, including a claim of retaliation and a claim that the First Amendment was violated by the policy).

129. Outten & Peratis, *supra* note 14, at 299-300, 321.

caused harm to employees in a Title VII protected class.¹³⁰ Additionally, even if there is no discrimination or harm, a policy applied at all times will be presumed to violate Title VII under the EEOC guidelines.¹³¹ A policy applied only at certain times may not violate Title VII under the EEOC guidelines if there is a business necessity for the policy, but this presumption again arises without a requirement that there is discrimination or harm to an employee in a Title VII protected class.¹³²

This is problematic because without harm, the Supreme Court has found there is no actionable discrimination claim.¹³³ In a sexual harassment case arising under Title VII, the Supreme Court found that harm must be "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment'" in order for there to be an actionable discrimination claim.¹³⁴ Even though the case concerned intentional sexual harassment, the Ninth Circuit, considering an English-only policy, relied on the case to find that discrimination must be severe or pervasive because the Supreme Court's rationale also applied to neutral policies that led to discrimination.¹³⁵

The presumption under the EEOC guidelines that an English-only policy discriminates also requires an employer that implemented an English-only policy at certain times to provide a defense for discrimination that may have never occurred or harm that is not "pervasive."¹³⁶ If the policy is applied at all times, the employer has no defense, even if the policy does not lead to discrimination or harm.¹³⁷ Under the EEOC guidelines, discrimination would be presumed in the case of the radio DJ in *Jurado* who was limited by an English-only policy that did not allow him to continue to use "street Spanish" in his radio program, regardless of whether this limitation was harmful or discriminatory.¹³⁸ Disparate impact, on the other hand, recognizes that if there is no discrimination or harm, an employer should not be penalized for an employment policy.¹³⁹ In the case of the radio DJ, the DJ may still show discrimination, but if there is no discrimination in practice or harm as a result of the policy, the case ends and there is no need for the employer to show business necessity to defend a non-discriminatory practice.¹⁴⁰

The EEOC's attempt to place the burden for a Title VII claim concerning an English-only policy on the employer demonstrates its failure

130. *Id.* at 320-21.

131. *Id.*

132. *Id.*

133. *See Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986).

134. *Vinson*, 477 U.S. at 67.

135. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488-89 (9th Cir. 1993).

136. *Spun Steak*, 998 F.2d at 1489.

137. *See Outten & Peratis*, *supra* note 14, at 320-21.

138. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cir. 1987).

139. *Jurado*, 813 F.2d at 1409.

140. *See id.*

to recognize judicial precedent, academic and scholarly analysis, and the legislative intent of the 1991 Act. Furthermore, the EEOC ignores the valid competing interests of employers and employees when considering a discrimination claim under Title VII.¹⁴¹

B. Disparate Impact Protects Employee Language and Employer Rights

1. Language and National Origin

Language is an integral part of national origin because language is a reflection of a person's culture and ethnicity. As a result, discrimination can occur based on the language a person speaks. Accordingly, language as a part of national origin can be protected under Title VII.¹⁴²

Sociologists and sociolinguistics recognize that language is part of national origin because it is a reflection of ethnicity, community, and cultural traits.¹⁴³ The existence in American society of foreign language newspapers, television, and schools demonstrates that foreign language is a thread that links communities and cultures that speak common languages together.¹⁴⁴ For example, Spanish is the language used by the ancestors of Latinos and links that population together by national origin.¹⁴⁵ Language also affects the way a person's national origin is perceived because people react to others based "upon our perception of their racial and ethnic status . . . [e]thnic 'traits' and personal characteristics are often more accurate predictors of prejudicial behavior than a person's actual national origin."¹⁴⁶ Courts have also recognized that language is tied to culture and ethnicity making it a part of a person's national origin.¹⁴⁷

In *Gutierrez*, the Ninth Circuit emphasized the importance of language.¹⁴⁸ The court discussed the merits of having a multicultural society and explained the connection between a culture and that culture's language stating that "language remains an important link to . . . ethnic

141. See 42 U.S.C.A. §2000e-2(k) (West 2007); *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 67 (1986); *Maldonado v. City of Altus*, 433 F.3d 1294, 1303, 1305 (10th Cir. 2006); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993); *Gutierrez v. Mun. Ct.*, 838 F.2d 1031, 1039-40 (9th Cir. 1988); H.R. REP. NO. 102-40(I), at 24 (1991); *Outten & Peratis*, *supra* note 14, at 321.

142. Brief for ACLU, *supra* note 14, at 5-6; *Outten & Peratis*, *supra* note 14, at 299-300, 318-23; *Perea*, *supra* note 3, at 274-79.

143. *Perea*, *supra* note 3, at 276 ("It is through the expression of ethnicity, one's cultural continuity and cultural traits, that 'national origin' has perceptible meaning. Primary language is recognized in sociology and sociolinguistics as a fundamental aspect of ethnicity.").

144. *Id.* at 278 ("The existence in the United States of a thriving ethnic mother-tongue press, non-English commercial broadcasting, and schools designed to preserve foreign languages demonstrates that primary language is fundamental to ethnicity.").

145. David Ruiz Cameron, *How the Garcia Cousin's Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1364 (1997).

146. *Outten & Peratis*, *supra* note 14, at 300-01.

147. *Gutierrez*, 838 F.2d at 1039.

148. See *id.* at 1038-40.

culture and identity . . . [t]he primary language not only conveys certain concepts, but is itself an affirmation of that culture.”¹⁴⁹ The court explained that in order to protect language it adopted the “EEOC’s business necessity test.”¹⁵⁰ By specifically adopting the business necessity part of the EEOC guidelines, this decision shows that it is not necessary to apply the EEOC guidelines as a whole to protect language as a part of national origin. Disparate impact uses business necessity and does not presume harm, which is consistent with the *Gutierrez* court’s emphasis on the proper “balance” between the “individual’s interest in speaking his primary language and any possible need of the employer.”¹⁵¹ When the court adopted a business necessity test and applied the disparate impact analysis to come to a result that protected the employees from discrimination based on national origin, the court demonstrated that disparate impact should be applied, rather than the EEOC guidelines.¹⁵²

In contrast, the *Spun Steak* court properly rejected the EEOC guidelines, but failed to consider the importance of language. The court focused on the fact that the bilingual employees spoke English, and therefore, were able to comply with the English-only policy.¹⁵³ The court’s focus on the feasibility of compliance with the English-only policy was misplaced. Title VII protects employees from policies they should not have to comply with because the policies interfere with the culture and ethnicity associated with language as a part of national origin.¹⁵⁴ The court should have focused on whether the English-only policy discriminated because it limited, classified, or segregated the employees.¹⁵⁵ The *Maldonado* court corrected this by applying disparate impact to protect language as a part of national origin without focusing on the ability of a bilingual speaker to comply with an English-only rule.¹⁵⁶

The Tenth Circuit in *Maldonado* demonstrated that language can be protected under the disparate impact analysis by making the role of language an integral part of the disparate impact analysis.¹⁵⁷ By comparing an English-only policy to a policy requiring religious groups to wear a badge, the *Maldonado* court properly addressed the protection required for employees with a primary language other than English. The court explained:

149. *Id.* at 1039.

150. *Id.* at 1040.

151. *Id.*

152. *Id.* at 1040, 1044-45.

153. *Spun Steak*, 998 F.2d at 1487.

154. See Cameron, *supra* note 145, at 1352-54.

155. *Id.* at 1362 (“The fair—and literal—reading of the statute is that limiting, segregating, or classifying an employee ‘in any way’ which would even ‘tend’ to deprive her of employment opportunities, or to ‘adversely affect’ her employment status, is ‘unlawful.’”).

156. Juliet Stumpf, *English-Only Cases: Litigating the Diverse Workplace*, 34 A.B.A. SEC. LABOR AND EMPLOYMENT LAW 6 (2006).

157. *Maldonado*, 433 F.3d at 1304-05.

A policy requiring each employee to wear a badge noting his or her religion, for example, might well engender extreme discomfort in a reasonable employee who belongs to a minority religion, even if no co-worker utters a word on the matter. Here, the very fact that the City would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics.¹⁵⁸

Based on the understanding of the value of language as a part of national origin, the employee was able show a prima facie case that an English-only policy caused disparate impact based on national origin.¹⁵⁹ The court referenced the EEOC guidelines only to show that it is reasonable for a jury to conclude there may be a hostile work environment as the result of an English-only policy, not to show that national origin can only be protected by a presumption that English-only policies always create a hostile work environment.¹⁶⁰ This demonstrates that the Tenth Circuit did not need to apply the EEOC guidelines to protect employees from discrimination.

2. Employer Rights

There is no exact definition of the business necessity that employers are required to prove in a disparate impact analysis.¹⁶¹ However, there is good reason for allowing employers to make decisions on how to effectively run their businesses.

First, employers need the freedom to enact policies to run their businesses safely. In an article focusing on the importance of protecting language as a part of national origin, the author concedes that effective supervision is a legitimate business justification for an English-only policy.¹⁶² Moreover, if employers need employees to work in hazardous work environments it is in the best interest of the employer, as well as the employee, that there is effective communication in case of an emergency: "In hazardous or potentially hazardous work environments or in emergency situations, safety is always a legitimate business interest."¹⁶³

The argument may be made that hazardous work environments are not safer when an English-only policy is in place. In the extreme, the argument may be extended to claim that these policies prevent an employee from reporting an emergency situation because that employee cannot report the emergency in English, but is afraid to violate the policy

158. *Id.* at 1305.

159. *See id.* at 1304-06.

160. *Id.* at 1306.

161. *See* H.R. REP. NO. 102-40(I), at 32-35 (1991).

162. Perea, *supra* note 3, at 307.

163. Linda M. Mealey, Note, *English-Only Rules and "Innocent" Employers: Clarifying National Origin Discrimination and Disparate Impact Theory under Title VII*, 74 MINN. L. REV. 387, 434 (1989).

by reporting it in his or her primary language.¹⁶⁴ The court in *Maldonado* counters this argument effectively when it points out that, "[i]t would be unreasonable to take offense at a requirement that all pilots flying into an airport speak English in communications with the tower or between planes."¹⁶⁵ The *Maldonado* court's analogy demonstrates that employers are entitled to run a safe business and implement policies to facilitate safety.¹⁶⁶ The EEOC guidelines fail to reflect this legitimate right of employers by placing the burden to show business necessity on the employer first, regardless of whether the policy has a discriminatory impact.¹⁶⁷

Second, an employer needs the freedom to run his or her business productively and efficiently.¹⁶⁸ The Ninth Circuit acknowledged the freedom of a business to make policies to run a productive business in *Jurado*.¹⁶⁹ The court, applying a disparate treatment analysis and a disparate impact analysis, emphasized that a radio DJ can be required to use English only on his program because "[s]uccess in radio depends on appealing to specific segments of the listening community," which is a legitimate business interest.¹⁷⁰ Furthermore, the Fifth Circuit, in a case on an English-only policy issued before the EEOC guidelines, recognized that "[j]udges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment."¹⁷¹

The Ninth Circuit went even further in recognizing the rights of employers to run their businesses in *Spun Steak* noting that:

A privilege, however, is by definition given at the employer's discretion; . . . an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity.¹⁷²

While these cases emphasize the rights of employers, the *Maldonado* court's analysis of business necessity shows that while businesses are allowed some deference to make policies to effectively and safely run their businesses, a disparate impact analysis does not over-

164. Lisa L. Behm, Comment, *Protecting Linguistic Minorities under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 599 (1998).

165. *Maldonado*, 433 F.3d at 1305.

166. *See id.* at 1306-07.

167. *Id.* at 1305.

168. *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091-92 (5th Cir. 1975) (discussing an employer's right to determine how to properly run a business).

169. *Jurado*, 813 F.2d at 1410.

170. *Id.*

171. *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980).

172. *Spun Steak*, 998 F.2d at 1487.

value this deference to employer's needs at the cost of allowing discrimination against employees.¹⁷³ For example, the *Maldonado* court indicates that an English-only policy to facilitate communication over the company radio may be a legitimate business necessity.¹⁷⁴ However, the court found that there was no evidence that the policy was enacted to correct this problem or that the problem even existed, so the court did not affirm summary judgment for the employer.¹⁷⁵ This demonstrates that properly applied, business necessity does not sacrifice employees' rights because employers must have a legitimate business necessity, not just an explanation, for a policy that discriminates in practice.¹⁷⁶ Moreover, the Amicus Curiae Brief from the ACLU on the side of the employees in *Maldonado*, while favoring the EEOC guidelines, spent half the brief applying a disparate impact analysis, showing it is a standard that can be applied fairly.¹⁷⁷ Overall, the *Maldonado* court's opinion demonstrates that a disparate impact analysis can be applied to balance the rights of employers and prevent discrimination, without protecting employees or employers to the disadvantage of the other party.

C. Legislative Intent

The 1991 Act unequivocally demonstrated the legislative intent to codify the disparate impact analysis set forth in *Griggs*.¹⁷⁸ The House Report noted that "[t]he *Griggs* decision has had an extraordinarily positive impact on the American Workplace."¹⁷⁹ Moreover, the House Report on the 1991 Act pointed out the test set forth by *Griggs* favors both employers and employees by improving working conditions and improving procedures and standards used by employers.¹⁸⁰

Even prior to 1991, courts considered the legislative intent of Title VII to create a balance between preventing discrimination and preserving an employer's freedom to run a business.¹⁸¹ The Supreme Court, in a case considering gender discrimination under Title VII, stated that its repeated "emphasis on 'business necessity' in disparate-impact cases . . . and on 'legitimate, nondiscriminatory reason[s]' in disparate-treatment cases . . . results from our awareness of Title VII's balance between employee rights and employer prerogatives."¹⁸² In contrast, the approach in the EEOC guidelines of presuming that an English-only policy is dis-

173. See *Maldonado*, 433 F.3d at 1306.

174. See *id.* at 1306-07.

175. *Id.*

176. See *id.* at 1306.

177. Brief for ACLU, *supra* note 14, at 9.

178. See H.R. REP. NO. 102-40(I), at 23-28 (1991).

179. *Id.* at 25.

180. *Id.* ("Major corporations have had to rethink their personnel policies In doing so, many found that they have improved the working conditions of all employees . . . there have been improvements in their procedures and standards . . .").

181. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242-43 (1989).

182. *Price Waterhouse*, 490 U.S. at 242-43.

criminy fails to achieve this balance because it favors "employee rights" over "employer prerogatives."¹⁸³

In rejecting the EEOC guidelines in *Spun Steak*, the Ninth Circuit recognized the guidelines go against the legislative intent behind Title VII:

It is clear that Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer. In striking that balance, the Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof.¹⁸⁴

The Tenth Circuit opinion in *Maldonado* is not consistent with the legislative intent of Title VII because the court refers to the EEOC guidelines, but applies a disparate impact analysis. The court pointed out the EEOC guidelines are "not controlling upon the courts by reason of their authority"¹⁸⁵ and proceeded to give minimal importance to the EEOC guidelines.¹⁸⁵ However, instead of deferring to the legislative intent of Title VII and proceeding with the disparate impact analysis that the opinion relied on up until that point, the court pointed out that while it is "not suggesting that the guideline is evidence admissible at trial or should be incorporated in a jury instruction," it is suggesting that the guidelines are an "indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference."¹⁸⁶ In light of this discussion of the EEOC guidelines, it may have been logical for the court to draw a conclusion about the role of the EEOC guidelines and a separate conclusion about a disparate impact analysis, but the court did not draw a conclusion on either analysis.¹⁸⁷ Also, the court cited the EEOC guidelines to determine that a reasonable jury may conclude that an English-only policy creates a hostile work environment.¹⁸⁸ However, a reasonable jury may draw the same reasonable conclusions based on a disparate impact analysis, and therefore, any reference to the EEOC guidelines is unnecessary and confusing.¹⁸⁹ While the court failed to recognize the legislative intent of Title VII, it still properly applied a disparate impact analysis.

The impact of this inconsistency in the courts is demonstrated in the brief drafted by the ACLU on the side of the employees in *Maldonado*

183. See *Spun Steak*, 998 F.2d at 1489-90.

184. *Id.* at 1490.

185. *Maldonado*, 433 F.3d at 1305-06 (citing *Spun Steak*, 998 F.2d at 1489-90).

186. *Id.* at 1306.

187. *Id.*

188. *Id.*

189. See *id.* at 1303-06.

that was compelled to apply both the EEOC guidelines and a disparate impact analysis.¹⁹⁰ This confusion can be corrected if future decisions from all the circuits follow the legislative intent of Title VII and use a disparate impact analysis.

CONCLUSION

The conflict between the Ninth Circuit's complete rejection of the EEOC guidelines and the Tenth Circuit's hesitation to reject the guidelines outright demonstrates that there needs to be an affirmative decision on what standard to apply when an English-only policy is at issue. The EEOC guidelines presume that English-only policies cause harm, while a disparate impact analysis uses burden shifting, which preserves the balance between the needs of employers and the protection of employees from discrimination. Without a definitive adoption of a disparate impact analysis or the EEOC guidelines, employers and employees cannot know what policies constitute discrimination under Title VII. In order to resolve this conflict, the disparate impact approach should be uniformly accepted. As the country's foreign population continues to grow, Title VII's protection of national origin becomes increasingly important and the disparate impact approach should be utilized by the courts in order to preserve legislative intent, protect employers by allowing employers to run business safely and effectively, and protect language as an integral part of a person's national origin.

*Melissa Meitus**

190. Brief for ACLU, *supra* note 14, at 9.

* J.D. Candidate, May 2008, University of Denver Sturm College of Law. I would like to thank my parents, my brother, and Jeremy Loew for their endless support, as well as Prof. Martin J. Katz, Associate Professor of Law at the University of Denver Sturm College of Law, and the *Denver University Law Review* Board and Staff.

FORESTS ON FIRE: THE ROLE OF JUDICIAL OVERSIGHT, FOREST SERVICE DISCRETION, AND ENVIRONMENTAL REGULATIONS IN A TIME OF EXTRAORDINARY WILDFIRE DANGER

INTRODUCTION

The western United States currently struggles with wildfire conditions, which threaten people and property more than ever before.¹ In 2006, wildfires burned over 9.8 million acres,² encompassing an area more than twice the size of New Jersey.³ Heat,⁴ drought,⁵ high forest density, and forest mismanagement⁶ contribute to the recent increased danger.⁷ These factors combine to compromise tree health and increase

1. WHITE HOUSE OFFICE OF COMMUNICATIONS, HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES 4 (2002) [hereinafter HFI], available at http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf (noting that wildfires killed nearly 200 firefighters during the last decade. An example of the increased threat is the recent Hayman fire, which “was five times bigger than the previous largest fire in Colorado’s modern history, and forced evacuations in over 80 communities.” *Id.* In 2002, the Hayman fire and other Colorado wildfires forced 77,000 residents to evacuate for periods of up to several weeks. *Id.* at 5. Thus, wildfires forced more than 1.5 percent of Coloradans to evacuate. See Colorado QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/08000.html> (last visited Jan. 20, 2007) (Colorado population statistics); see also Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation*, 36 ENV. L. 301, 302 (2006) (noting “[a] spate of record-setting fire seasons have seen millions of acres burned, hundreds of homes destroyed, numerous lives lost, and multi-million dollar fire suppression bills”). But see *infra* notes 49-62, 73 and accompanying text (discussing the idea that humans cause most of the dangers associated with wildfires). See also Forest Guardians, Appeal of the County Line Vegetation Management Project Record of Decision and Environmental Impact Statement Rio Grande National Forest Conejos Peak Ranger District (2005), available at <http://www.fguardians.org/library/paper.asp?nMode=1&nLibraryID=240> (expressing the view that the government exaggerates the danger).

2. Wildland Fire Statistics, http://www.nifc.gov/stats/fires_acres.html (last visited Feb. 14, 2007).

3. Christopher Smith, *Wildfires Take the Worst Toll in Acreage Since '60*, SEATTLE TIMES, Sept. 14, 2006, available at http://seattletimes.nwsources.com/html/nationworld/2003257891_wildfires14.html.

4. EPA: Global Warming: Climate, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html> (last visited Jan. 20, 2007) (noting that global warming likely causes the increased temperatures).

5. U.S. Drought Monitor, <http://drought.unl.edu/dm/monitor.html> (last visited Feb. 14, 2007) (on file with author) (indicating that “severe droughts” currently affect certain areas in each Tenth Circuit state).

6. STEPHEN J. PYNE, FIRE IN AMERICA 242-60 (1997). Likely the most biologically significant element of forest mismanagement in the western United States is fire suppression. *Id.* (noting that the movement toward widespread, comprehensive fire suppression began about a century ago).

7. Keiter, *supra* note 1, at 314-15 (noting that 22,000 communities and over 39 million acres in national forests “face an unnaturally high fire danger” and indicating that many experts define the threat as an “unprecedented forest health crisis”); National Interagency Fire Center, National Year-to-Date Report on Fires and Acres Burned by State (Dec. 17, 2006), http://www.nifc.gov/stats/ytd_st.htm; National Interagency Fire Center, Total Wildland Fires and Acres (1960-2005), http://www.nifc.gov/stats/fires_acres.html (demonstrating that more acres burned in 2006 than any year on record).

the number of trees that are dead and dry.⁸ One significant cause of the current high rate of tree mortality is a recent bark beetle infestation.⁹ These beetles attack stressed trees, and have killed millions of trees in recent years.¹⁰

To combat the forest's volatility, President George W. Bush announced the Healthy Forest Initiative ("HFI") in 2002, and Congress enacted the Healthy Forests Restoration Act ("HFRA") in 2003, both of which call for swift action.¹¹ Both the HFI and HFRA purport to combat wildfire danger by streamlining regulations that control some Forest Service projects.¹² Specifically, the HFI and HFRA allow the Forest Service to forgo environmental analysis before planning, implementing, and completing certain logging projects.¹³ Additionally, the directives strip the judiciary of its jurisdiction to hear cases involving some projects.¹⁴ The HFI and HFRA ostensibly aim to protect people, property, and forest health by increasing the Forest Service's ability to quickly and efficiently treat at-risk forests.¹⁵

Decision makers must balance the restoration of ecosystem health against the safety of people and property. Ecosystems are delicate, dynamic, and dependent on specific elements and events.¹⁶ Modifications to any part of an ecosystem may cause profound consequences.¹⁷ Scientists generally agree that fire is an integral part of most ecosystems.¹⁸ Although ecosystems need fire, many people want to eliminate wildfires because they threaten human safety and property. This presents an espe-

8. Northern Arizona University Ecological Restoration Institute, Fire Season and Forest Restoration Update (2006), <http://www.eri.nau.edu/cms/content/view/702/906/> [hereinafter Fire Season and Forest Restoration Update].

9. *Id.* It is important to understand that bark beetle infestations are natural, cyclical events, which periodically occur in many healthy forests. Therese M. Pollard & Robert A. Haack, *Reading the Lines Under Bark*, ENTOMOLOGY NOTES 25 (1998), available at <http://insects.ummz.lsa.umich.edu/MES/notes/entnote25.pdf>.

10. PAIGE LEWIS ET AL., COLO. DEPT. OF NATURAL RESOURCES, DIV. OF FORESTRY, REPORT ON THE HEALTH OF COLORADO'S FORESTS 2004, SPECIAL ISSUE: PONDEROSA PINE FORESTS 1 (2004), available at <http://csfs.colostate.edu/library/pdfs/fhr/04fhr.pdf> (noting that, in Colorado, the beetle infestation killed "approximately 1.2 million trees" in 2004, "nearly one hundred times the mortality reported in 1996").

11. Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (2003) (codified as amended at 16 U.S.C.A. §§ 6501-6591 (West 2007)); HFI, *supra* note 1, at 2.

12. 16 U.S.C.A. § 6501; HFI, *supra* note 1, at 2; see also *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006) (describing of the relevant regulations).

13. 16 U.S.C.A. § 6514; HFI, *supra* note 1, at 13; see also *Colo. Wild*, 435 F.3d at 1209.

14. 16 U.S.C.A. § 6515.

15. 16 U.S.C.A. § 6501; United States Dept. of Agriculture, Fact Sheet, Making a Difference: Fishlake National Forest – Utah, http://www.healthyforests.gov/projects/state_projects/00-ut-fishlake-nf.pdf (stating that "[i]t was clear that action needed to occur quickly to decrease the threats of uncharacteristically intense and severe wildfires"). But see Forest Guardians, *supra* note 1 (noting that many environmentalists are skeptical about the Forest Service's true intentions). "The Healthy Forests Restoration Act of 2003 . . . used forest insect outbreaks as a justification for increasing logging and limiting environmental protections." *Id.*

16. See generally ALDO LEOPOLD, SAND COUNTY ALMANAC (1968).

17. *Id.*

18. Keiter, *supra* note 1, at 303.

cially difficult problem because ecosystems are complex and not entirely understood. Ill-conceived projects could eventuate in short-term wildfire relief, while ultimately increasing future danger and causing long-lasting harm to ecosystem health.

This year the Tenth Circuit ruled on four cases concerning Forest Service logging projects promulgated under the HFI and HFRA.¹⁹ These cases are important because they illustrate how the court interprets the recent directives. The Tenth Circuit struggled with the legislation's significant grant of Forest Service deference and recognized that misguided projects may have potentially severe consequences.²⁰ Each Tenth Circuit case involved projects in forest regions with high wildfire danger, which targeted areas endangered by or susceptible to high tree mortality, caused bark beetle infestation.²¹ Therefore, bark beetles are an important element of the litigation. Embedded in the cases is the issue of who should play essential roles in striking the balance between wildfire danger and ecosystem health, i.e., should the Forest Service have unfettered discretion or should courts adjudge the legality of Forest Service projects?

This article explores the relationship between wildfire danger, ecosystem health, bark beetles, agency discretion, and judicial oversight. The purpose of this paper is fourfold. Part I examines the biological and social factors related to wildfires in lodgepole pine ecosystems and ponderosa pine ecosystems, and the bark beetles²² role therein. Part II spotlights this issue's timeliness and importance to public policy. Part III scrutinizes recent changes in the law and analyzes the two most recent Tenth Circuit decisions involving logging projects and bark beetles. Part IV articulates a well-reasoned set of rules, which support responsible thinning projects and incorporate black letter law, dicta, and generally accepted science.

19. The cases are: *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183 (10th Cir. 2006); *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732 (10th Cir. 2006); *Utah Envtl. Cong. v. Bosworth*, 439 F.3d 1184 (10th Cir. 2006); and *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204 (10th Cir. 2006). When referencing logging or thinning, this paper does not refer to all logging or thinning projects. This paper only addresses pre-fire projects in wildfire prone areas that use recently enacted legislation to avoid environmental regulations and judicial oversight. There are substantial issues regarding post-fire timber salvaging projects. Keiter, *supra* note 1, at 334-36. While it seems dubious that recent jurisdiction-stripping statutes that reduce required environmental analyses are either necessary or beneficial for post-fire projects, that topic is beyond the scope of this paper.

20. See *infra* text accompanying notes 155-98.

21. *Ecology Ctr., Inc.*, 451 F.3d at 1186-88; *Utah Envtl. Cong.*, 443 F.3d at 737-38; *Utah Envtl. Cong.*, 439 F.3d at 1187; *Colo. Wild, Heartwood*, 435 F.3d at 1212.

22. There are many different species of bark beetles, each consuming the bark of one preferred species of evergreen tree. Tom DeGomez & Beverly Loomis, *Firewood and Bark Beetles in the Southwest*, THE UNIVERSITY OF ARIZONA COOPERATIVE EXTENSION, Sept, 2005, at 2, available at <http://cals.arizona.edu/pubs/insects/az1370.pdf>. Differences exist between the species, but the issues involving the species are similar; they kill trees and make forests more susceptible to devastating wildfires. *Id.*

I. THE SCIENCE

This section describes wildfire's role in healthy lodgepole pine forests and ponderosa pine forests. It also illustrates humans' impacts on those ecosystems and explains the problems associated with the wildland urban interface and bark beetles.

A. Wildfires in Healthy Lodgepole Pine Ecosystems and Ponderosa Pine Ecosystems

To understand fire behavior in a healthy forest, one must first recognize the dynamics of a healthy forest. Wildfires play divergent roles in different ecosystems. Some ecosystems need frequent, small fires, and other ecosystems depend on infrequent, large fires.²³ Wildfires are a complicated necessary element of most terrestrial ecosystems.²⁴ Numerous ecosystems exist in the Tenth Circuit,²⁵ most of which naturally experience fire.²⁶ In the Tenth Circuit region, wildfires in lodgepole pine ecosystems and ponderosa pine ecosystems present the most significant risk to people and their property; therefore, this paper focuses on these ecosystems.²⁷

1. Healthy Lodgepole Pine Ecosystems

Lodgepole pine ecosystems commonly occur at middle elevations (between 8,000 to 10,000 feet in Colorado).²⁸ High tree density typifies this ecosystem.²⁹ Generally, the risk of a large wildfire is high in some tree stands, but low in others.³⁰ Lodgepole pine seeds open when exposed to fire and flourish in bare, sunny areas, like those recently devastated by a large wildfire.³¹ Thus, lodgepole pine regeneration depends on

23. See generally Colorado State Forest Service, Colorado's Major Tree Species, <http://csfs.colostate.edu/majortrees.htm> (last visited Jan. 20, 2007) (listing the major tree species in Colorado, describing their preferred ecosystem, and indicating their relationship with fire).

24. PYNE, *supra* note 6, at 34-44.

25. Scheidler Center for Science Learning, Mesa State College, Ecosystems of Colorado, <http://www.mesastate.edu/schools/snsn/shideler/ecosys.htm> (last visited Jan. 20, 2007) (listing Colorado ecosystems as grassland, semidesert shrubland, pinon-juniper woodland, riparian land, montane shrubland, montane forest, subalpine forest, treeline, and alpine tundra).

26. Colorado State Forest Service, *supra* note 23.

27. Wildfires in these ecosystems are the most dangerous due to the ecosystem's size, typical proximity to the wildland urban interface, and the amount of highly combustible fuel.

28. Colorado Natural Heritage Program, Rocky Mountain Lodgepole Pine Forest, http://www.cnhp.colostate.edu/projects/eco_systems/pdf/RM_Lodgepole_Pine_Forest.pdf (last visited Jan. 20, 2007).

29. *Id.*

30. See *infra* notes 32-34 and accompanying text. Younger stands are typically more resistant to events such as bark beetle infestations, while other, older, less vigorous tree stands are unable to resist outbreaks and are more susceptible to fire. See Scott Condon, *Bark Beetles Converge on Pitkin County Buffet Table*, ASPEN TIMES, Apr. 25, 2006, available at <http://www.aspentimes.com/article/20060425/NEWS/104250028&SearchID=7326358606296>.

31. I RUSSELL M. BURNS & BARBARA H. HONKALA, SILVICS OF NORTH AMERICA 604 (1990), available at http://www.na.fs.fed.us/pubs/silvics_manual/volume_1/silvics_vol1.pdf; *Fires and Chainsaws*, THE VOICE FOR THE WILD (Biodiversity Conservation Alliance), Summer 2005, at

large, stand replacing, crown fires for regeneration.³² The result is a dense, evenly-aged stand.³³ Over time, isolated wildfires result in a mosaic of many tree stands of different ages.³⁴

2. Healthy Ponderosa Pine Ecosystems

Relatively few trees populate mature, healthy ponderosa pine forests.³⁵ This lower elevation ecosystem (generally between 6,000 to 8,000 feet in Colorado)³⁶ typically contains old trees, which create a high canopy—well above the forest bottom.³⁷ Grasses, shrubs, and seedling trees, that seldom become large and well-developed, cover the forest bottom.³⁸ In this ecosystem, wildfires periodically burn the underbrush but seldom reach the forest canopy.³⁹ Ponderosa pine ecosystem fires burn at relatively low temperatures, generally encompass small areas, and infrequently become catastrophic crown fires.⁴⁰ While these low intensity fires rarely affect mature trees, they do suppress undergrowth, thereby reducing competition for mature trees.⁴¹ This promotes the prolonged viability of mature trees, prevents fire ladders from forming, and thins the forest naturally.⁴² Today, healthy ponderosa pine forests and lodgepole pine forests are both anomalies in the western United States.⁴³

4. available at http://www.voiceforthewild.org/general/newsletter/theVoicefortheWild_Summer2005.pdf.

32. Colorado Natural Heritage Program, *supra* note 28 (noting that moderate ground fires do not play a significant role in lodgepole pine ecosystems); *Fires and Chainsaws*, *supra* note 31.

33. BURNS & HONKALA, *supra* note 31, at 608; *Fires and Chainsaws*, *supra* note 31, at 6.

34. See Condon, *supra* note 30.

35. Robert L. Peters et al., *Managing for Forest Ecosystem Health: A Reassessment of the "Forest Health Crisis,"* <http://www.defenders.org/bio-fh00.html> (click on Section 5) (last visited Jan. 20, 2007) (noting that periodic wildfires reduce forest density).

36. Biotic Communities of the Colorado Plateau: Ponderosa Pine Forest, http://www.cpluhna.nau.edu/Biota/ponderosa_forest.htm (last visited Jan. 20, 2007).

37. HFI, *supra* note 1, at 4 (noting that typical ponderosa pine forests were 15 times less dense a century ago).

38. *Fires and Chainsaws*, *supra* note 31, at 4.

39. *Biodiversity Assoc. v. Cables*, 357 F.3d 1152, 1156-57 (10th Cir. 2004); see Peters et al., *supra* note 35.

40. *Biodiversity*, 357 F.3d at 1156-57.

41. *Id.*

42. U.S. Forest Serv., *Sustaining Alpine and Forest Ecosystems: Development of Management Alternatives for Fire-Prone and Fire-Dependent Ecosystems in Colorado and the Black Hills*, <http://www.fs.fed.us/rm/landscapes/Fire/Fuelreduce.shtml> (last visited Jan. 20, 2007) [hereinafter U.S. Forest Serv., *Sustaining Alpine and Forest Ecosystems*] (defining a fire ladder as plant material that is high enough to spread a fire to the forest canopy); see Peters et al., *supra* note 35 (click on Section 5).

43. Dominick A. DellaSala et al., *Forest Health: Moving Beyond Rhetoric to Restore Healthy Landscapes in the Inland Northwest*, 23 WILDLIFE SOC'Y BULL. 346 (1995), available at http://maps.wildrockies.org/ecosystem_defense/Science_Documents/DellaSala_et_al_1995.pdf; see also "Forests," in PAUL HARRISON & FRED PEARCE, AAAS ATLAS OF POPULATION AND THE ENVIRONMENT 127 (2001), available at <http://atlas.aaas.org/pdf/127-30.pdf> (noting that people have logged 95% of the forests in the United States).

B. Wildfires in Today's Unhealthy Lodgepole Pine and Ponderosa Pine Ecosystems

Unnaturally high wildfire danger currently threatens lodgepole pine ecosystems and ponderosa pine ecosystems in Tenth Circuit forests.⁴⁴ Different factors elevate the danger in each ecosystem, but wildfires in both ecosystems threaten people and property; therefore, similar issues arise.

1. Wildfires in Today's Unhealthy Lodgepole Pine Ecosystems

Probably the biggest problem in lodgepole pine ecosystems in the Tenth Circuit results from a century of fire suppression.⁴⁵ Removal of fire from lodgepole pine forests resulted in the lack of a mosaic of variously aged tree stands.⁴⁶ One hundred years of broad fire suppression resulted in a high proportion of old trees, because no young trees replaced tree stands consumed by catastrophic fire events.⁴⁷ Thus, lodgepole pine forests in the Tenth Circuit are unvarying, uniformly declining in vigor, and simultaneously susceptible to events like bark beetle infestations.⁴⁸ Widespread bark beetle infestations, high tree mortality, and extraordinary fire danger mark the aging tree stands in the Tenth Circuit.

2. Wildfires in Today's Unhealthy Ponderosa Pine Ecosystems

The effects on the ponderosa pine ecosystem are equally profound. When settlers came to the Rockies more than a century ago, they could drive a wagon through the old growth ponderosa pine forests.⁴⁹ Now, trees are so dense that a person cannot even walk through some of those same forests.⁵⁰ In most of the western United States, overdeveloped understories and immature canopies comprise ponderosa pine forests.⁵¹ Years of fire suppression, logging, and grazing have caused this ecological crisis.⁵² High tree density, one of the most significant results of the degradation, provides more fuel for wildfires.⁵³ Consequently, wildfires

44. See *supra* notes 1-4 and accompanying text.

45. *Fires and Chainsaws*, *supra* note 31, at 4.

46. *Id.*

47. *Id.*

48. Condon, *supra* note 30 (noting that 90% of the trees "are in the aged classification[,] "the vast majority of lodgepole pines in the state are 100 years of age and older[,] . . . [and] [t]rees more than 80 years old are susceptible to mountain pine beetles").

49. USDA Forest Service - Healthy Forest Initiative, <http://www.fs.fed.us/projects/hfi/index.shtml> (last visited Jan. 20, 2007).

50. *Id.* (noting that historic, healthy ponderosa pine forests had around 25 mature trees per acre and "[t]oday the same forest may have more than 1,000 trees on the same acre").

51. José F. Negrón & John B. Popp, *Probability of Ponderosa Pine Infestation by Mountain Beetle in the Colorado Front Range*, 191 FOREST ECOLOGY & MGMT. 17, 25 (2004).

52. *Biodiversity*, 357 F.3d at 1156; Peters et al., *supra* note 35 (click on Section 4). But, the Forest Service claims that grazing does not result in dramatically increased wildfire danger. Interview with Mr. Rick Cables, Rocky Mountain Regional Forest Ranger, United States Forest Service, in Denver, Colo. (Oct. 18, 2006).

53. Negrón & Popp, *supra* note 51.

in today's ponderosa pine forests burn hotter and faster, and consume larger areas.⁵⁴ Some experts warn that the "risk of catastrophic natural disturbances [such as wildfires] has become probable in many areas."⁵⁵ Thus, human impact on forest ecosystems in the Tenth Circuit has caused massive, widespread wildfire susceptibility in lodgepole pine ecosystems and ponderosa pine ecosystems.

C. *The Wildland Urban Interface Problem*

The wildland urban interface constitutes areas where people build homes and other structures amongst undeveloped vegetation.⁵⁶ Humans are moving into forested areas at a dramatic rate, especially in the western United States.⁵⁷ This current, dramatic rise in human relocation from cities to wooded areas causes the wildland urban interface to grow.⁵⁸ A good example of this migration is the Colorado Front Range, where builders develop approximately 10 acres in or around forests every hour.⁵⁹ Mr. Rick Cables, Rocky Mountain Regional Forest Ranger, described the effects of this trend as "homes in a sea of green."⁶⁰ This geographic expansion of human population results in an increased number of homes and businesses susceptible to wildfires.⁶¹ The current wildfire danger results directly from a century of mismanaged forests, unfavorable climate conditions, and urban sprawl.⁶² Bark beetle infestations compound the problem.

D. *The Bark Beetle*

The bark beetle is "the most destructive forest insect in western North America."⁶³ These beetles kill trees, thereby increasing fire dan-

54. See *Biodiversity*, 357 F.3d at 1156-57.

55. U.S. Forest Serv., Sustaining Alpine and Forest Ecosystems, *supra* note 42.

56. V. C. Radelhoff et al., *The Wildland Urban Interface in the United States*, 15 ECOLOGICAL APPLICATIONS 799 (2005), available at http://silvis.forest.wisc.edu/publications/PDFs/Radelhoff_et_al_ea2005.pdf.

57. FORESTS AT THE WILDLAND-URBAN INTERFACE: CONSERVATION AND MANAGEMENT 3 (Susan W. Vince et al. eds., CRC Press 2005) [hereinafter FORESTS AT THE WILDLIFE-URBAN INTERFACE] (noting that the increase doubled in the past ten years).

58. *Id.* at 3 ("A recent inventory of the nation's land base indicated that 2.2 million acres of rural and open space land were lost to development each year . . . much of this newly developed land had been forested. Urban expansion into the countryside has not only displaced . . . [the] forest, it has also mixed with these rural lands."); Radelhoff, *supra* note 56, at 799 (noting that "39% of all houses" in the "coterminous United States" are in the wildland urban interface); Interview with Rick Cables, *supra* note 52 (stating that "people live in forests now, more than ever").

59. DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW; CASES AND MATERIALS 1148 (Robert C. Clark et al. eds. 2002).

60. Interview with Rick Cables, *supra* note 52 (describing his visual observations of the Colorado Front Range wildland urban interface during flyovers).

61. U.S. Forest Serv., Four Threats – Quick Facts (2006), <http://www.fs.fed.us/projects/four-threats/facts/fire-fuels.shtml> [hereinafter U.S. Forest Serv., Four Threats].

62. See *supra* Part I.B.1.; see also FORESTS AT THE WILDLIFE-URBAN INTERFACE, *supra* note 57.

63. Barbara J. Bentz, *Mountain Pine Beetle Population Sampling: Inferences from Lindgren Pheromone Traps and Tree Emergence Cages*, 36 CANADIAN J. FOREST RES. 351 (2006) (citing R.L.

ger because dead trees dry and become more combustible.⁶⁴ A couple of years after a severe bark beetle infestation, a forest can morph into a giant stand of kindling.⁶⁵ A few years later, many of the dead trees fall and increase fuel on the forest floor.⁶⁶

Many factors and a long series of events caused the current beetle outbreak in lodgepole pine ecosystems in Tenth Circuit forests. In short, recent elevated temperatures, drought conditions, and high tree density contribute to increased tree stress.⁶⁷ Bark beetles target and decimate stressed trees.⁶⁸ Stressed trees exude a compound that attracts the beetles.⁶⁹ Once a beetle finds a suitable host tree, it emits pheromones, which entice additional beetles.⁷⁰ The beetles then consume the inside of the tree's bark, which almost always kills the tree.⁷¹ Most scientists theorize that bark beetle infestations are nature's way of thinning forests that are too dense.⁷² The threat of wildfires is a portentous consequence of this cycle.⁷³ Despite the fact that bark beetles play an important role in forest ecosystems, they are on a collision course with the public policy interests of protecting human safety and property.⁷⁴

The massive scale of bark beetle infestations escalates the magnitude of the problem. Scientific evidence indicates that bark beetles are responsible for more than 20% of tree mortality in some forests.⁷⁵ Other research found that bark beetles infested nearly 40% of trees in sample areas.⁷⁶ Bark beetle infestations are common in the wildland urban inter-

Furniss & V.M. Caroline, *Western Forest Insects*, USDA Forest Serv. Misc. Pub. 1339 (1977), available at http://www.usu.edu/beetle/documents/2006Bentz_%20MPBTTrapping.pdf.

64. Fire Season and Forest Restoration Update, *supra* note 8.

65. See Arizona Forest Health, http://ag.arizona.edu/extension/fh/bb_fa.html (last visited Jan. 20, 2007) [hereinafter FAQ].

66. *Id.*

67. *Id.*

68. Negrón & Popp, *supra* note 51, at 23; see also Pollard & Haack, *supra* note 9.

69. FAQ, *supra* note 65.

70. *Id.*

71. *Id.*

72. Pollard & Haack, *supra* note 9.

73. *Id.* It is important to understand that bark beetles are one of many causes of wildfire danger; humans are another cause. Fire Ecology Page, http://www.pacificbio.org/Projects/Fire2001/fire_ecology.htm (last visited Jan. 20, 2007) (noting that "[a]pproximately 90% of fires in the last decade have been human-caused, either through negligence, accident or intentional arson"). Arguably, this fact and the trend of human migration into forested areas combine to make humans the primary cause of most wildfires. See National Wildfire Coordinating Group, *Wildlife Origin and Cause Determination Handbook*, National Wildfire Coordinating Group 65 (2005), available at <http://www.nwccg.gov/pms/pubs/nfes1874/nfes1874.pdf> (listing wildfire causes as lightning, camping, smoking, debris burning, arson, equipment use, railroad, children, power lines, cutting, welding, grinding, firearm use, blasting, structures, glass refraction, glass magnification, spontaneous combustion, flare stack, and pit fires).

74. Negrón & Popp, *supra* note 51, at 17.

75. USDA Forest Serv., *Sustaining Alpine Forest Ecosystems: Landscape Pathology, Disease Economics, and Impact Assessment* (2006), <http://www.fs.fed.us/rm/landscapes/Research/Economics.shtml>.

76. Appeal of County Line Vegetation Management Project Record of Decision and Environmental Impact Statement Rio Grande National Forest Conejos Peak Ranger District at 12-13, filed Sept. 19, 2005, available at http://www.fguardians.org/legal/appeal_county-line-vegetation-

face,⁷⁷ thereby compounding the problem to an even greater extent. In the end, these infestations increase the likelihood of wildfires and threaten tens of thousands of people, their homes, and their businesses.⁷⁸

II. PUBLIC POLICY CONCERNS

Why are bark beetles currently at the center of some Tenth Circuit litigation? The answer is simple: they increase fire danger. Addressing wildfire danger is important because: (1) it has economic ramifications for the Forest Service; (2) it may represent an excuse to log forests; and (3) it threatens people and property.⁷⁹

A. Economic Ramifications for the Forest Service

The Forest Service struggles with budgetary problems, losing millions of dollars annually on logging projects.⁸⁰ Regulations contribute to these budgetary difficulties.⁸¹ Unnecessary or inefficient regulations may overburden the Forest Service and waste time and money.⁸² The Forest Service claims that voluminous statutes, many of which are nearly incomprehensible or contradictory, impede its efficiency.⁸³ Streamlining the process is appropriate when it ameliorates budgetary problems and

EIS-rio-grande-forest_9-19-05.pdf [hereinafter Appeal of County Line] (citing T.T. Veblen et al., *Disturbance Regime and Disturbance Interactions in a Rocky Mountain Subalpine Forest*, 82 J. ECOL. 125 (1994)).

77. FORESTS AT THE WILDLIFE-URBAN INTERFACE, *supra* note 57, at 3; DellaSala et al., *supra* note 43, at 353. For example, Colorado's Front Range, the mountainous area just west of Boulder, Denver, and Colorado Springs, has a dramatic bark beetle problem, Negrón & Popp, *supra* note 51, at 18 (noting that bark beetles killed almost half a million trees in 2001, the majority of which were in the Colorado Front Range); U.S. Forest Serv., Sustaining Alpine and Forest Ecosystems, *supra* note 42.

78. HFI, *supra* note 1, at 1.

79. See Appeal of County Line, *supra* note 76, at 12-13.

80. *Id.* (stating that logging in the 10th Circuit is essentially never a money-making proposition due to typical tree type, tree size, and costs associated with road construction). See generally RANDALL O'TOOLE, REFORMING THE FOREST SERVICE 98-137 (Island Press 1988).

81. Keiter, *supra* note 1, at 337.

82. The basis for this assertion is not costs associated with litigation. It is debatable whether costs of litigation significantly hinder the Forest Service. First, only a small percentage of projects are litigated. Second, if the court enjoins a project, the hindrance is not the regulation, but rather the Forest Service's failure to follow the law. Additionally, litigation costs are minimal in the context of this article's argument, i.e., projects involving pre-fire fuel reduction. Robert Keiter explains:

Thus far, comparatively little fire-related litigation has involved challenges to pre-fire hazardous fuel reduction projects or suppression policy decisions. In the few reported cases involving challenges solely to hazardous fuel reduction project proposals, the courts have usually sustained agency decisions against NEPA, NFMA, and other claims, finding that the proposals have been adequately analyzed and documented. But when the agencies have sought to justify post-fire salvage logging projects on hazardous fuel removal or disease prevention grounds, the courts have not been as receptive.

Id. at 336.

83. Interview with Rick Cables, *supra* note 52. The government passed these laws over the course of a century, during which time leadership changed, agency goals mutated, and biological understanding morphed. See generally Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625 (1997).

poses little environmental risk.⁸⁴ Responding to this concern, President George W. Bush and Congress recently decreased the Forest Service's accountability and diminished its responsibility to complete environmental analyses.⁸⁵ These efforts to increase Forest Service efficiency probably exceeded the limits of reasonable mitigation of the problem. Diminishing Forest Service accountability creates new, and likely more serious, problems because projects have long-lasting, widespread, and significant effects.

B. Wildfires May Represent an Excuse to Log

The Forest Service's propensity to use wildfire danger and bark beetles to justify the approval of logging projects constitutes another public policy concern.⁸⁶ The Forest Service's budget problems provide an incentive to manipulate the classification of projects into categories that allow for abbreviated regulations and no judicial review. Using legislation in this way contradicts the drafters' intent.⁸⁷ Legislation should not prevent courts from striking down projects that employ this distortion. Allowing the Forest Service to manipulate statutes in this manner constitutes irresponsible public policy.

*C. Danger to People and Property*⁸⁸

Wildfires threaten vast portions of the western United States.⁸⁹ "A spate of record-setting fire seasons have seen millions of acres burned, hundreds of homes destroyed, numerous lives lost, and multi-million dollar fire suppression bills."⁹⁰ In Colorado, 2.4 million acres in the Front Range are "at high risk to catastrophic fire."⁹¹ Wildfires similarly endanger an additional 6.3 million acres in Colorado.⁹² Misguided management of this fragile situation could result in billions of dollars of waste, further degradation of habitat, and destruction of sensitive plant

84. See *infra* Part IV.A. (detailing circumstances when an abbreviated process is rational). Streamlining the process is sometimes beneficial because laws related to fire are "an uncoordinated and fragmented welter of organic statutory provisions, environmental protection mandates, annual budget riders, site-specific legislation, judicial decisions, policy documents, management plans, and diverse state statutory prohibitions." See Keiter, *supra* note 1, at 303-04. A primary example of a circumstance that warrants this streamlined process is thinning projects in the wildland urban interface. See *infra* Part IV.A.

85. See *infra* Part III.B.2.

86. Forest Guardians, *supra* note 1.

87. Employing this legislation to approve projects where wildfires do not significantly endanger people or property represents using bark beetles as a smokescreen to log. Both cases addressed in this paper involve proposed logging projects in forests that are far from any significant human population. See RandMcNally, <http://randmcnally.com/> (click on "online maps," type in "Cedar City, UT," zoom into magnification level 5) (showing that Fishlake National Forest and Dixie National Forest are not in close proximity to any communities).

88. See *supra* notes 1-10 and accompanying text.

89. See U.S. Forest Serv., Four Threats, *supra* note 61.

90. Keiter, *supra* note 1, at 302.

91. U.S. Forest Serv., Sustaining Alpine and Forest Ecosystems, *supra* note 42.

92. *Id.*

and animal species.⁹³ The end result of mismanagement could be the emergence of even higher wildfire volatility and amplified threats to people and property.⁹⁴

In order to mitigate the threat to people and property, Congress must fully understand the potential ramifications of its legislation. It is equally important that Forest Service projects fall within the parameters of legislative intent. If a Forest Service project is not consistent with the legislative intent, courts should enjoin the project. Solving this problem requires a prudent analysis that protects short-term interests and ensures long-term ecological health, both of which eventuate in the protection of people and property.⁹⁵

III. THE LAW

By scrutinizing administrative standards, statutes, and recent Tenth Circuit cases, this section illustrates the amount of deference that courts give Forest Service decisions and explains the Forest Service's role in creating regulations.

A. Administrative Review

Before delving into applicable statutes and recent Tenth Circuit decisions regarding logging in beetle-infested and wildfire-endangered areas, one must understand the relevant administrative framework. The Forest Service provides input during the legislative drafting process and writes the administrative appeals regulations, both of which define the legality of its own actions.⁹⁶ A Forest Service official approves logging

93. U.S. Forest Serv., *Four Threats*, *supra* note 61.

94. For example, if the Forest Service logs in a manner that prevents a healthy, mature canopy with few fuel ladders, fire danger will increase over time. See generally Press Release, Tom DeGomez, Forest Health Specialist, University of Arizona, Status of the Pine Bark Beetle Outbreak in Arizona (Feb. 7, 2006), available at http://ag.arizona.edu/extension/fh/news_releases/06_23_04.pdf. Examples of projects that fail to effectively mitigate wildfire volatility exist in the Tenth Circuit. See *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1187 (10th Cir. 2006) (describing a proposal that included logging aspen stands, which bark beetles do not infest); DellaSala et al., *supra* note 43, at 346. See generally National Forest Protection Alliance, *Myths and Facts About Logging National Forests*, http://www.rso.cornell.edu/snrc/documents/NFPA_MythsFacts.pdf (last visited Jan. 20, 2007).

95. This article focuses on methods that seem feasible for large-scale governmental implementation. Many solutions seem plausible for smaller scale treatments, such as those on an individual's property. USDA Forest Serv., Mountain Pine Beetle: Solar Treatment Kills Mountain Pine Beetles in Pine Logs, Sustaining and Alpine and Forest Ecosystems <http://www.fs.fed.us/rm/landscapes/Solutions/Pinebeetle> (last visited Jan. 20, 2007). These methods generally require significant expenditures of time and money, but may be practicable for property owners. See *id.* (stating that these techniques include solarization, which is essentially cutting down infested trees and wrapping them in plastic; thus, trapping the bark beetles); DeGomez & Loomis, *supra* note 22. This creates a greenhouse-like environment where temperatures exceed 160 degrees. See FAQ, *supra* note 65. Pesticides are effective against trees that are not already infested, but they are toxic to many animals in addition to bark beetles. *Id.* Finally, traps exist that capture beetles after attracting them via pheromones. Bentz, *supra* note 63, at 351-52; see FAQ, *supra* note 65 (noting that traps are not currently practical for controlling beetle populations, but suggesting that researchers may develop a trap that could decrease the beetle population).

96. See *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1209-10 (10th Cir. 2006).

permit sales.⁹⁷ If a party files a complaint against the Forest Service, a Forest Service official hears the petition and adjudges the legality of the Forest Service plan or action.⁹⁸ During this petition, the Forest Service official has discretion to interpret applicable statutes.⁹⁹ The Tenth Circuit recently commented on the problematic outcome of this process:

The demonstration of compliance with the applicable regulatory regime heightens the transparency and legitimacy of the Forest Service when it dons multiple hats: it is the institution that issues the legal provision, the institution that is subject to the provision, and the institution charged with the power to interpret the provision.¹⁰⁰

During the administrative appeal, plaintiffs sometimes face the nearly insurmountable task of proving to the Forest Service that it broke a rule that it created and freely interprets.¹⁰¹ The plaintiff's next hurdle involves the judicial appeals process, in which the appellate court¹⁰² gives strong deference to the Forest Service's administrative decision.¹⁰³ This procedure is favorable to the Forest Service and detrimental to the plaintiff.¹⁰⁴

97. See *Ecology Ctr.*, 451 F.3d at 1195.

98. See *id.*

99. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

100. *Ecology Ctr.*, 451 F.3d at 1195.

101. See *Colo. Wild.*, 435 F.3d at 1214. In all four cases on which this paper focuses, the Forest Service ruled in its own favor, finding no merit in the plaintiff's claims. *Ecology Ctr.*, 451 F.3d at 1184; *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 740 (10th Cir. 2006).

102. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1564 (noting that in the 10th Circuit, a trial court is functionally analogous to an appellate court when reviewing an administrative decision).

103. *Chevron*, 467 U.S. at 842-43 ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); see also *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1170 (10th Cir. 1999) (noting that the deference is applied in special force, "especially when that interpretation involves questions of scientific methodology").

104. *Utah Envtl. Cong.*, 439 F.3d at 1188 (noting that courts review decisions by the Forest Service under the Administrative Procedures Act and courts will only set aside a Forest Service decision if it is a "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (citing 5 U.S.C.A. § 706(2)(A) (West 2007))); see also Jon A. Souder & Sally F. Fairfax, *Arbitrary Administrators, Capricious Bureaucrats, and Prudent Trustees: Does it Matter in the Review of*, 18 PUB. LAND & RESOURCES L. REV. 165, 168-69 (1997) (citing MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS (1988)) (espousing a very critical view of the review process and characterizing it as involving "idiot" and "lunacy" standards). This paper does not suggest that the administrative process' inherent flaws approach idiocy or lunacy. However, the system does provide potential avenues that remove checks and balances on Forest Service interests. This framework should heighten the court's responsibility of ensuring that agencies act within the boundaries of relevant statutory guidelines.

Thus, the Forest Service helps create partisan laws that are inherently discretionary and self-regulatory.¹⁰⁵ Since courts usually defer to Forest Service administrative decisions,¹⁰⁶ this process creates a system fraught with biased decision-making and inequality of powers.¹⁰⁷ Therefore, in order to guard against abuses of power, courts must be prudent when assessing whether projects comply with laws.¹⁰⁸ While the Forest Service is afforded generous deference, it still must comply with statutes such as NEPA and NFMA.

B. Pertinent Statutes and Directives

1. NEPA and NFMA: The Environmental Movement¹⁰⁹

In the 1970's Congress acknowledged the importance of careful environmental analysis for Forest Service projects, such as logging projects, by enacting The National Environmental Policy Act of 1970 ("NEPA") and The National Forest Management Act of 1976 ("NFMA").¹¹⁰ These Acts address "the Forest Service's well-documented penchant for harvesting commercial timber" by creating a procedural and substantive framework for agency projects.¹¹¹ NEPA and NFMA require the Forest Service to complete environmental analyses and restrict projects with significant impacts.¹¹² Most litigation over Forest Service projects involves these acts.¹¹³ Therefore, this section illustrates some specific requirements of NEPA and NFMA.

NEPA is a procedural statute that requires agencies, including the Forest Service, to consider and publicly disclose an action's impacts and alternative projects.¹¹⁴ NEPA's goals are "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man[.]"¹¹⁵ To accomplish these goals, NEPA compels federal agencies to analyze the environmental impacts of "major Federal actions significantly affecting the quality of the human environment[.]"¹¹⁶ Ini-

105. *Colo. Wild*, 435 F.3d at 1213 (noting that the Administrative Procedure Act's arbitrary and capricious standard is narrow). HFI and HFRA compound this problem by reducing the opportunity for judicial review. See *infra* Part III.B.2.

106. *Colo. Wild*, 435 F.3d at 1213.

107. See *Ecology Ctr.*, 451 F.3d at 1195.

108. One of the biggest problems with HFI and HFRA is that they remove this judicial oversight in some circumstances. See *infra* Part III.B.2.

109. Additional statutes such as the Endangered Species Act also control Forest Service actions. See Keiter *supra* note 1, at 333.

110. *Id.* at 332-33.

111. *Id.*

112. *Id.* at 333.

113. *Id.*

114. 42 U.S.C.A. § 4321 (West 2007).

115. *Id.*

116. 42 U.S.C.A. § 4332; see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 332-33 (1989).

tially, an agency must take a "hard look"¹¹⁷ at the project's environmental effects and evaluate its impact by performing an Environmental Assessment.¹¹⁸ An Environmental Assessment must provide "sufficient evidence and analysis" and determine if the action will significantly affect the environment.¹¹⁹ If an Environmental Assessment indicates no significant effects, NEPA requires no additional analysis.¹²⁰ If the agency finds that a proposed action may have significant environmental effects, it must perform an Environmental Impact Statement.¹²¹ In addition to establishing an environmental procedural framework for agency actions, NEPA established the Council on Environmental Quality ("CEQ"), an advisory council appointed by the President.¹²² Reporting to the President, the CEQ develops and recommends national environmental policies, reviews federal programs, conducts investigations, and may institute amendments to NEPA.¹²³

NFMA is a substantive statute, which controls agency actions, including the Forest Service, and places restrictions on land management.¹²⁴ NFMA designates National Forests for "multiple use" and requires that Forest Service projects ensure a "sustained yield."¹²⁵ In order to insure that its goals are met, NFMA requires the use of the "best available science."¹²⁶ NFMA demands that decisions are based on "current information and guidance,"¹²⁷ which rely upon "[c]omprehensive evaluations . . . [of] ecological conditions and trends that contribute to sustainability."¹²⁸ NFMA requires the Forest Service to identify and monitor populations of specific species,¹²⁹ called "management indicator spe-

117. See *Ecology Ctr.*, 451 F.3d at 1189.

118. *Utah Envtl. Cong.*, 443 F.3d at 736 (citing 40 C.F.R. § 1508.9 (2005)).

119. *Id.* (quoting 40 C.F.R. § 1508.9 (2005)).

120. 40 C.F.R. § 1508.9(a)(1) (2005).

121. 40 C.F.R. § 1508.9(b) (2005); see *infra* Part III.B.2 (describing the recent legislation that deregulates requirements to perform Environmental Impact Statements and Environmental Assessments in some situations).

122. 42 U.S.C.A. § 4342 (West 2007); Clean Air, <http://www.whitehouse.gov/ceq/aboutceq.html> (last visited Jan. 20, 2007).

123. 42 U.S.C.A. § 4344 (1)-(8) (West 2007). See generally Clean Air, *supra* note 122. The CEQ is empowered to amend NEPA. 40 C.F.R. § 1504.1(c). In fact, CEQ has recently decreased NEPA's strength by creating "categorical exclusions" which allow some Forest Service thinning projects to proceed without environmental regulations. See Fact Sheet, Administrative Actions to Implement the President's Healthy Forests Initiative December 12, 2002 at 3-4, available at http://www.whitehouse.gov/ceq/hfi_usda-doi_fact_sheet_12-11-02.pdf. The effects of these categorical exclusions are discussed in depth in Part III.B.2.

124. 16 U.S.C.A. § 1604(a) (West 2007).

125. 16 U.S.C.A. § 1604(e)(1). Multiple uses include timber, so long as its harvest is sustainable. *Id.*

126. 36 C.F.R. § 219.6(a)(3)(b)(iii) (2005).

127. 36 C.F.R. § 219.3 (2003).

128. 36 C.F.R. § 219.6(a)(1) (2003).

129. In order to satisfy this requirement, the Forest Service must use quantitative data. 36 C.F.R. § 219.6 (2003).

cies,”¹³⁰ which indicate a project’s overall effects on the health of the entire ecosystem.¹³¹

2. HFI and HFRA: The Jurisdiction-Stripping Movement

Widespread, deadly, and destructive fires devastated the western United States at the turn of the twenty-first century and President Bush reacted.¹³² With the stated goal of increasing agency efficiency and suppressing wildfires, the President announced the HFI.¹³³ While the HFI was not substantively significant, it had great procedural significance.¹³⁴ The HFI effectively dissolved many NEPA requirements by adopting the CEQ’s new categorical exclusions for fuel reduction thinning projects up to 4,500 acres for high-risk areas outside the wildland urban interface¹³⁵ and small, live tree harvests.¹³⁶ The categorical exclusions establish an avenue for the Forest Service to avoid performing an Environmental Impact Statement and an Environmental Assessment.¹³⁷ Some categorical exclusions are subject to an “extraordinary circumstances” limitation, which precludes situations that may cause a “significant environmental effect[.]”¹³⁸ The statutory definition of categorical exclusions also requires that a project have no significant cumulative or individual environmental effect.¹³⁹ The HFI also weakened the judicial appeals process by restricting the parties who may appeal project decisions, restricting appeals of categorical exclusions, and eliminating certain types of appeals altogether.¹⁴⁰ Professor Robert Keiter recently summarized HFI as

130. 36 C.F.R. § 219.19(a)(1) (2003).

131. *Id.*; *Utah Envtl. Congress*, 439 F.3d at 1188.

132. Keiter, *supra* note 1, at 332.

133. *Id.* at 337-39.

134. 40 C.F.R. § 1508.4 (2005); *Colo. Wild*, 435 F.3d at 1209. This also results in the lack of a public release of environmental analysis and potential alternative projects. *Id.*; see also U.S. Forest Service Manual § 1909.15(30.3) (2004).

135. U.S. Forest Service Manual § 1909.15(31.2)(10) (2004) (noting that no more than 1000 of those acres can employ mechanical thinning).

136. *Id.* The Forest Service may harvest healthy tree stands up to 70 acres or may thin dead tree stands up to 250 acres and avoid environmental regulation and judicial oversight. *Id.*

137. 10 C.F.R. § 51.21-22; *Colo. Wild*, 435 F.3d at 1209. Altogether, Forest Service regulations stipulate 24 categorical exclusions, most of which are quite reasonable. See U.S. Forest Service Manual § 1909.15(31.2) (2004) (listing current categorical exclusions). Circumstances with limited effects such as trail construction, utility line maintenance, native plant regeneration, and so on, should remain categorical exclusions.

138. 40 C.F.R. § 1508.4 (2005). Extraordinary circumstances also switch the burden of proof.

139. See *infra* note 166 (defining cumulative effects). It is problematic that categorical exclusions, by definition, have no cumulative impact, because common sense dictates that some categorical exclusions must have a cumulative effect. For example, a 4500-acre thinning project promulgated under a categorical exclusion (which could be adjacent to multiple other 4500 acre thinning projects promulgated under a categorical exclusion) would most definitely have a cumulative impact on the environment.

140. There is some doubt as to whether the Healthy Forest Initiative will survive intact. See Keiter, *supra* note 1, at 340-42; see also *infra* note 179.

“a targeted assault on the basic legal framework governing forest management in the name of efficiency and safety.”¹⁴¹

In 2003, Congress followed the President’s lead by passing the HFRA. The HFRA was a collaborative effort that addressed some environmental concerns, but like the HFI, it removed judicial oversight from some Forest Service actions and eliminated the requirement for certain environmental analyses.¹⁴² The HFRA dedicated over three quarters of a billion dollars¹⁴³ to achieve its purpose of “reducing wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects[.]”¹⁴⁴ Similar to the HFI, the HFRA supported expedited judicial review and the CEQ’s categorical exclusions.¹⁴⁵ While HFRA does provide the environmental upshot of protecting endangered species and creating a tree diameter cap,¹⁴⁶ these environmental protections are insignificant when compared to the harm that may result from HFRA’s jurisdiction stripping and deregulation of environmental analysis. Professor Robert Keiter summarized the problematic effects of HFI and HFRA:

[T]he public land agencies are no longer directly accountable for their fire-related management decisions. The principal legal accountability mechanisms--the NFMA planning standards, NEPA environmental analysis requirements, ESA consultation mandates, and related administrative and judicial review opportunities--have all been modified in the name of managerial efficiency. At the planning level, the Forest Service’s revised NFMA rules have eliminated NEPA compliance from planning level decisions and jettisoned key biodiversity and other management standards, thus effectively insulating most fire-related and other forest planning decisions from judicial review. At the project level, under the HFRA and the Healthy Forests Initiative reforms, NEPA and NFMA compliance obligations have been significantly curtailed too. Add on the recent ESA consultation reforms and revised administrative appeal regulations, and the agencies face few explicit legal constraints when making important fire-related management decisions, as well as little likelihood of administrative or judicial intervention.¹⁴⁷

141. Keiter, *supra* note 1, at 343 (“It is hard to see these reforms as anything other than an overt effort to significantly reduce judicial oversight opportunities by removing substantive legal mandates from forest management and eliminating NEPA-based procedural requirements from the planning process.”). *Id.*

142. See 16 U.S.C.A. § 6501 (West 2007).

143. 16 U.S.C.A. § 6518.

144. 16 U.S.C.A. § 6501.

145. 16 U.S.C.A. §§ 6514-6516.

146. Keiter, *supra* note 1, at 344-45.

147. *Id.* at 368-69.

NEPA, NFMA, HFI, and HFRA all assert a goal of promoting forest health,¹⁴⁸ although they attempt to achieve this goal in quite disparate manners. NEPA and NFMA empower environmental ideals by requiring analyses and accountability.¹⁴⁹ HFI and HFRA eliminate requirements for environmental analysis, reduce judicial oversight, and weaken NEPA and NFMA.¹⁵⁰ The President and Congress agree that an integral part of promoting forest health includes the elimination of conditions that lead to catastrophic wildfire danger.¹⁵¹ They attempt to achieve that goal by deregulating the Forest Service and increasing its discretion. A deregulated Forest Service with significant discretion enacted the blanket fire suppression philosophy, which contributed to the current predicament.¹⁵² Granting the Forest Service that responsibility again could eventuate in the same results—mismanagement and disaster. Legislation should not restrain courts from ensuring that the Forest Service complies with the law. Rather, courts should probe the reasoning behind Forest Service projects. In a recent, classic deference case, *Utah Environmental Congress v. Bosworth*,¹⁵³ the Tenth Circuit was unwilling to examine the subject matter of the case and thus, failed to probe the Forest Service's reasoning.¹⁵⁴

C. Tenth Circuit Cases

1. *Utah Environmental Congress v. Bosworth*¹⁵⁵

a. Facts and Procedural History

In *Utah Environmental Congress*, the plaintiff challenged a 123-acre thinning project.¹⁵⁶ The project, which treated bark beetle infested trees in Utah's Fishlake National Forest, was not located in the wildland urban interface.¹⁵⁷ The Forest Service approved the project pursuant to the Forest Service's categorical exclusion for thinning projects on small parcels.¹⁵⁸ The Forest Service proceeded without public comment or

148. See 16 U.S.C.A. § 1604 (West 2007); 16 U.S.C.A. § 6501 (West 2007); 42 U.S.C.A. § 4321 (West 2007); HFI, *supra* note 1, at 1.

149. See *supra* Part III.B.1.

150. See *supra* Part III.B.2.

151. See 16 U.S.C.A. § 1604(a) (West 2007); 16 U.S.C.A. § 6501 (West 2007); 42 U.S.C.A. § 4321 (West 2007); see also HFI, *supra* note 1, at 1.

152. Keiter, *supra* note 1, at 306.

153. 443 F.3d 732 (10th Cir. 2006).

154. *Id.* at 738-40.

155. *Id.* at 732.

156. *Id.* at 735.

157. *Id.* It is noteworthy that this logging project was not likely to reduce wildfire danger to humans. It was in an unpopulated area far from communities. See *supra* note 87 and accompanying text. The Forest Service claims that this project guarded human interests by protecting watersheds. See interview with Rick Cables, *supra* note 52. But, considering the project's small size and isolated location, its connection to protecting people and property against wildfires seems attenuated. See *supra* note 87.

158. *Utah Envtl. Cong.*, 443 F.3d at 735.

disclosure of alternative projects.¹⁵⁹ The plaintiff, Utah Environmental Congress, claimed that the Forest Service violated the Administrative Procedure Act's requirement of a cumulative effects analysis and NEPA's public comment and disclosure requirement.¹⁶⁰ The Forest Service rejected the petition.¹⁶¹ Both the district court and the Tenth Circuit Court of Appeals affirmed, holding that the categorical exclusion was appropriate, no extraordinary circumstances existed, and HFRA allowed the preclusion of public comment and disclosure of alternatives.¹⁶²

b. Tenth Circuit Rationale

The Tenth Circuit avoided considering the subject matter of this case by deferring to the Forest Service administrative decision.¹⁶³ The opinion enunciated the rule that lower courts may not fail "to consider an important aspect of the problem" and must consider "relevant facts."¹⁶⁴ The court addressed the possibility that the proposal would have cumulative effects.¹⁶⁵ The opinion cited the definition of cumulative effects as follows:

[I]mpact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.¹⁶⁶

The court reasoned that logging projects on small parcels could not have a cumulative effect because, "[b]y definition, . . . a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environmental assessment need not be performed."¹⁶⁷

Considering the extraordinary circumstances exception to categorical exclusions,¹⁶⁸ the court conceded, "it may be conceptually possible for a large number of small projects to collectively create conditions that could significantly affect the environment."¹⁶⁹ The court acknowledged that "the degree of the potential effect of a proposed action on . . . resource conditions" determines whether there are extraordinary circum-

159. *Id.* at 740.

160. *Id.*

161. *Id.* at 739.

162. *Id.* at 735.

163. *Id.* at 739.

164. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

165. *Id.* at 740-41.

166. *Id.* at 740 (citing 40 C.F.R. § 1508.7 (2005)).

167. *Id.* at 741 (noting that cumulative impacts are synonymous with cumulative effects).

168. *Id.* at 740-41.

169. *Id.* at 741.

stances.¹⁷⁰ The court stopped short of assessing the big picture and entertaining the idea of carving out a new exception for thinning to mitigate wildfire danger.¹⁷¹

c. Discussion and Recommendations

This case makes some of the effects of the recent legislation readily apparent. By removing some regulatory constraints, HFRA allowed the Tenth Circuit to avoid examining potential environmental concerns. Rather than recognizing that (1) thinning projects may increase dramatically in beetle-infested areas, and (2) those thinning projects may have a considerable effect, the Tenth Circuit's circular reasoning¹⁷² gave deference to the Forest Service administrative court's technical aptitude and summarily dismissed the claim.¹⁷³ Thus, the court sidestepped the possibility that many small projects may combine to have a cumulative effect.

Courts may add additional extraordinary circumstances to the list if those circumstances have some "significant effect."¹⁷⁴ Therefore, the court could have continued its analysis of significant effects.¹⁷⁵ The court should have considered the significance of effects more broadly when it examined extraordinary circumstances. Wildfires threaten millions of acres.¹⁷⁶ Frequently, treating these at-risk areas is the best course of action.¹⁷⁷ Therefore, numerous projects may ensue.¹⁷⁸ The combined effects of these numerous projects may be significant. Employing reasoning and accepted science, the court should have recognized that the combined impact of potential projects could be significant.

The Forest Service creates the list of extraordinary circumstances; thus, it can add a new type of project to the list of extraordinary circumstances. The Forest Service should create a new class that includes small parcel logging projects in remote areas¹⁷⁹ that attempt to mitigate wildfire

170. *Id.* at 743.

171. *See id.*

172. *See supra* note 166 and accompanying text (quoting the Tenth Circuit's circular reasoning).

173. *Utah Envtl. Cong.*, 443 F.3d at 735.

174. *See id.* at 735-38; *Colo. Wild*, 435 F.3d at 1211 (noting that the list is not all-inclusive and "extraordinary circumstances include, but are not limited to" a list of circumstances).

175. *See supra* notes 162-71 and accompanying text.

176. *See supra* notes 1-4 and accompanying text.

177. *See infra* notes 215-22 and accompanying text.

178. The President and Congress expressed the goal of increased logging to mitigate wildfire danger. *See, e.g.*, Keiter, *supra* note 1, at 344-45 (noting that the legislature suggests aggressively removing trees in order to reduce fire danger).

179. "Remote areas" are outside the wildland urban interface. A logical definition of a "remote area" is a roadless area. Roadless areas contain "no provision for the passage of motorized transportation and which is at least 100,000 acres in extent." 25 C.F.R. § 265.1 (2005). It is noteworthy that laws affecting roadless areas might be in flux. The Clinton Administration provided environmental protections for roadless areas. These protections dissipated quickly under George W. Bush's administration, but Bush's efforts to reduce protections in roadless areas may prove unsuccessful. "A federal court [] struck down President Bush's effort to undo protections for roadless forests and reinstated President Clinton's Roadless Area Conservation Rule. The Clinton roadless rule protects

danger related to bark beetle infestations.¹⁸⁰ The number of acres affected by the beetles and the possibility of numerous ill-conceived land management strategies necessitates this new exception. The new class would increase the chance of long-term ecological success by requiring environmental analysis. Since the Forest Service drafts the regulations, it would be most efficient for it to create the exception. If the aforementioned analysis does not persuade the Forest Service, Congress should add the new class. If both the Forest Service and Congress fail to create the exception, the Tenth Circuit should exercise its power to do so by interpreting extraordinary circumstances.

2. *Ecology Center v. United States Forest Service*¹⁸¹

a. Facts and Procedural History

This case involved a larger-scale tree density reduction project in Utah's Dixie National Forest.¹⁸² No categorical exclusion applied to the project because it encompassed 11,835 acres, 552 acres of which were subject to clear cutting.¹⁸³ The forest was in a state of degradation.¹⁸⁴ Its high tree density yielded unhealthy trees and high wildfire danger.¹⁸⁵ Thus, the benefit of agency action¹⁸⁶ seemed apparent. The plaintiff, Ecology Center, filed a petition claiming that the Forest Service did not assess its proposed action using the "best available science."¹⁸⁷ Once again, the Forest Service rejected the petition, but in this case, the Tenth Circuit enjoined the project.¹⁸⁸

b. Tenth Circuit Rationale

In assessing the Forest Service's decision, the Tenth Circuit noted that while affording deference to the lower court, "our inquiry must 'be searching and careful.'"¹⁸⁹ The opinion then asserted that higher courts

about one-third of the acreage in National Forests from most logging and road construction." Newsroom, Center for Native Ecosystems, <http://www.nativeecosystems.org/newsroom> (follow "Clinton Roadless Rule Reinstated" hyperlink) (last visited Jan. 20, 2007). In addition to reintroducing NEPA's requirement for environmental analysis, public disclosure, and public comment, this recent issuance of a nationwide injunction against projects using Bush's regulatory scheme could restrict future logging projects in roadless areas. See generally *Earth Island Inst. v. Ruthenbeck* 459 F.3d 954, 966 (9th Cir. 2006); *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1004 (E.D. Cal. 2005).

180. The creation of the new class of extraordinary circumstances would not be necessary if Congress amended HFRA. See *infra* note 237.

181. 451 F.3d 1183 (10th Cir. 2006).

182. *Ecology Ctr. v. Russell*, 361 F. Supp. 2d 1310, 1312 (D.C. Utah 2005).

183. *Ecology Ctr.*, 451 F.3d at 1187.

184. *Id.* at 1186.

185. See *id.* at 1187.

186. Agency action does not just mean a logging project. Even though the NFMA and HFI focus primarily on mechanical thinning, prescribed or controlled burns are also effective agency actions. These actions are frequently preferable because, in addition to thinning the forest, they return nutrients to the soil.

187. *Ecology Ctr.*, 451 F.3d at 1195.

188. *Id.*

189. *Id.* at 1183 (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

generally submit to lower courts when evidence is “legitimately conflicting,” but this presumption is rebuttable and “the agency action may be overturned.”¹⁹⁰ In the court’s “careful search” it found no “legitimately conflicting” information as to the Forest Service’s failure to consider the “best available science.”¹⁹¹ In fact, the court indicated that the logging plan departed from what the Forest Service recognized as the “best available science.”¹⁹² The location of the proposed project is habitat for the Northern Goshawk.¹⁹³ Under the NFMA and the Dixie Forest Plan, the Forest Service has a duty to take special care to ensure the hawk’s viability.¹⁹⁴ Further, the Northern Goshawk is a “sensitive species” and the Dixie Forest Plan stipulates the goshawk as a management indicator species.¹⁹⁵ The Forest Service did not include the Northern Goshawk as a management indicator species, thereby failing to satisfy the legislation.¹⁹⁶ Next, the court addressed the meaning of best available science.¹⁹⁷ While noting that no black letter definition exists, the court explained that the Forest Service must use “the most accurate, reliable, and relevant . . . good-science” data.¹⁹⁸

c. Discussion and Recommendations

Creating a clear, concrete definition for best available science would provide effective guidelines for responsible forest thinning. Therefore, courts should adopt a bright line rule defining best available science as that which restores overall forest health and reduces the threat of catastrophic fire in the wildland urban interface.¹⁹⁹ Specifically, the rule should be the product of carefully inspecting scientifically legitimate data. The rule would allow removing dead or dying trees and thinning smaller trees in dense forests in the wildland urban interface. This would provide the Forest Service with guidance, which could result in more predictable judicial outcomes and more efficient procedures. Further, by conforming to these guidelines, the Forest Service would likely benefit from decreased litigation. Of course, the guidelines would be dynamic and capable of changing as science evolves.

190. *Id.* at 1188-89.

191. *Id.* at 1188.

192. *Id.* at 1193-94.

193. *Id.* at 1186 (citing *Inland Empire Pub. Lands v. U.S. Forest Serv.*, 88 F.3d 754, 759 (9th Cir.1996)). The Northern Goshawk population is dramatically decreasing and in 2002 the population was between 20-30 hawks. *Id.* at 1187.

194. *Id.* at 1186 (citing *Inland Empire*, 88 F.3d at 759).

195. *Id.*

196. *Id.* at 1195.

197. *Id.* at 1194.

198. *Id.*

199. The rationale for the definition of best available science parallels the rationale for the categorical exclusion proposed *infra* Part V.A.

IV. VIABLE SOLUTIONS: CREATING STANDARDS THAT INCORPORATE LAW, SCIENCE, AND RATIONALITY

Any proposed solution will likely cost money; therefore, a paramount issue is who should pay. Many people believe that individuals who assume the risk of living in wildfire-prone areas should not benefit from the government subsidization of an inherently dangerous lifestyle choice that degrades the environment.²⁰⁰ This argument begins with the idea that people living in mountainous, forested areas subject themselves to a greater chance of encountering a wildfire.²⁰¹ Therefore, these people should pay their own way via increased insurance premiums, higher taxes, or privatized thinning projects.²⁰² This concept analogizes individuals living in the wildland urban interface to those living on a flood plain or a coastal area that is overly susceptible to hurricanes.²⁰³ People living in those at-risk areas generally pay increased insurance premiums.²⁰⁴ States sometimes use their police power to impose restrictive zoning in especially at-risk areas.²⁰⁵ Maybe homeowners in the wildland urban interface should be subject to similar regulations. This deincincentivization may deter relocation into fire-prone areas and could promote movement back to urban areas. The fact that a significant number of endangered homes are second homes in mountain resort areas strengthens this argument, i.e., why should the majority of taxpayers who cannot afford to live in the mountains subsidize the wealthy few who can afford to live in the mountains? Many would argue that common people should not be forced to subsidize an obviously dangerous, ecologically degrading, and expensive luxury.

Though compelling, this argument faces significant hurdles.²⁰⁶ The government would have to implement it prospectively; thus, it would address only future wildfire threats, and not the current threat. The imposition of immediate, significant economic requirements on individuals living in at-risk areas could threaten those people's livelihoods. Gradual administration would not generate enough money to immediately combat the problem and would be a less effective deterrent. Thus, the idea of

200. See DellaSala et al., *supra* note 43, at 354; see also *All Things Considered: Bark Beetles Spark Western Wildfire Threat* (National Public Radio broadcast July 15, 2006), <http://www.npr.org/templates/story/story.php?storyId=5560058>.

201. See DellaSala et al., *supra* note 43, at 354.

202. *Id.*

203. *Id.*

204. *Id.*

205. Keiter, *supra* note 1, at 382-83.

206. States depend on many at-risk areas for tourism revenue. Increased taxes, insurance, and privatized thinning projects could significantly impact already skyrocketing lodging, food, and ski lift ticket prices. This may deter tourists. States and powerful political groups would disapprove of this consequence. Finally, a tremendous number of people live in at-risk areas. In fact, some studies indicate that nearly 4 out of every 10 homes are in the wildland urban interface. Radeloff et al., *supra* note 56, at 799. Resort areas are commonly at-risk for wildfires and many of the residents are politically powerful and wealthy. This group, dominant in both numbers and status, could represent a formidable opposition to the imposition of a new fiscal burden.

paying one's own way for a luxury and the concept of deterring undesirable activities should be a part of the long-term solution. However, solving the immediate problem requires additional measures.

Developing workable options for immediately mitigating the wild-fire danger must begin with the recognition that the problem directly results from past mistakes.²⁰⁷ In an executive press release prior to the adoption of the HFI, President Bush attributed the current problem of "unnaturally extreme fires" to "a century of well-intentioned but misguided land management."²⁰⁸ The President called for "[r]enewed efforts to restore our public lands to healthy conditions" and implied the need for wise and forward-thinking land management.²⁰⁹

Despite acknowledging the failures of "well-intentioned but misguided land management" of the past, the HFI states that careful analysis of current management results in "needless red tape and lawsuits."²¹⁰ The President emphasizes the urgency of wildfire management, and claims that an immediate, anticipatory attack is necessary to defeat wild-fire risk.²¹¹ He states "it is imperative that we act quickly."²¹² While this situation is urgent, it seems wise to support action that is rational as well as rapid.²¹³ Hasty actions are likely to give rise to long-term failure, which could endanger future generations. Prospective, yet rapid actions that employ foresight are superior to rash decisions. Decision makers must not repeat the mistakes of past "well-intentioned but misguided land management[.]"²¹⁴ The HFI is flawed because increased knowledge and long-term efficacy is worth a little time and effort; therefore, most projects should involve judicial oversight and in-depth environmental analysis of agency actions.

207. HFI, *supra* note 1, at 4; DellaSala et al., *supra* note 43, at 346.

208. HFI, *supra* note 1, at 1; Peters et al., *supra* note 35 (click on Executive Summary) ("The record of past mistakes shows that forest management must be redesigned to protect forest ecosystem health if the nation's forests are to sustainably provide us with economic benefits . . . Rather than legislate ill-advised, wholesale measures to cut more trees -- the very thing that caused many existing problems with forest ecosystem health -- the nation needs a coordinated, ecosystem-focused strategy that uses appropriate restoration techniques based on the best available science and carefully evaluated as to environmental impacts.").

209. HFI, *supra* note 1, at 1.

210. *Id.* at 1-2.

211. *Id.* at 10.

212. *Id.*

213. This article recognizes the urgency posed by wildfire danger, but suggests a less frantic approach. Natural threats are cyclic and the bark beetle infestations may lose momentum naturally. A good comparison by analogy is the fire danger caused by the dwarf mistletoe infection in the Rocky Mountains nearly ten years ago. See generally Kurt F. Kipfmüller & William Baker, *Fires and Dwarf Mistletoe in a Rocky Mountain Lodgepole Pine Ecosystem*, 108 *FOREST ECOLOGY & MGMT.* 77-78 (1998). Just as many people were bracing for a fight against the mistletoe, its danger declined dramatically. Another example is the Blue Mountain's recovery from western spruce budworm and Douglas-fir tussock moth outbreaks. Peters et al., *supra* note 35 (click on Section 3) ("Even in areas where disease or insect outbreaks are occurring, natural recovery is often relatively rapid.").

214. HFI, *supra* note 1, at 1.

After being carefully analyzed, acceptable projects should employ practices that incorporate established methods for reducing risk. Experts agree that reducing catastrophic fire danger in the wildland urban interface requires removing excess fuel, especially dead, highly combustible trees.²¹⁵ "A good rule to remember is '[i]f the tree is brown cut it down, if in doubt cut it out.'"²¹⁶ Research indicates "that a combination of thinning and prescribed burning, developed as elements of a site-specific treatment, can effectively restore . . . forests."²¹⁷ "Such treatments can [] decrease the severity of natural or human-caused fires."²¹⁸ Many environmental groups agree:

Some areas of forest -- particularly those dry forest types that have been most altered as a result of past logging, livestock grazing and fire suppression -- have become so dense with smaller trees that fire cannot be safely or successfully reintroduced without first reducing fuel loads. In overly dense stands, thinning some of the smaller trees from below the tree canopy has potential to facilitate fire's return and thereby improve forest ecosystem health.²¹⁹

Forest management tools include natural fire, prescribed fire, and elimination of grazing.²²⁰ Additionally, experts agree that preventative measures can limit bark beetle infestations.²²¹ The first step towards preventing bark beetle infestations is decreasing tree density via thinning.²²² These scientific statements demonstrate that that thinning sometimes increases forest health while protecting people and property.

Despite this evidence, some environmental groups advocate a do-nothing approach.²²³ This argument begins with the premise that legislation such as HFI and HFRA is not acceptable because laws should require environmental analysis and judicial oversight.²²⁴ Courts should hold the Forest Service accountable for following the law, analyzing

215. The reintroduction of fire into its natural role is preferable, but the balancing act of protecting people and property and allowing fires to burn in the wildland urban interface is precarious. When the reintroduction goes bad, it can be devastating. Recent examples of fire's danger to the wildland urban interface include a prescribed burn near Los Alamos, New Mexico that nearly overtook the city in 2000 and the 2003 wildfires in southern California, which destroyed 3,600 homes and killed 24 people. Keiter, *supra* note 1, at 310-11. Therefore, while the vast majority of people agree that blanket fire suppression is bad, incautious reintroduction is similarly dangerous. Consequently, a well-reasoned balance between reintroduction and selective suppression seems essential.

216. Press Release, Tom DeGomez, *supra* note 94.

217. Fire Season and Forest Restoration Update, *supra* note 8.

218. *Id.*

219. Peters et al., *supra* note 35 (click on Section 5). See generally Front Range Fuels Treatment Partnership (FRFTP), <http://www.frftp.org/> (last visited Jan. 20, 2007) (providing information about the Colorado State Forest Service's fuels reduction efforts).

220. See FAQ, *supra* note 65.

221. Press Release, Tom DeGomez, *supra* note 94.

222. *Id.*

223. Appeal of County Line, *supra* note 76, at 9-10.

224. *Id.* at 9.

environmental impacts, and publicly disclosing findings.²²⁵ At this point in the analysis, the do-nothing approach is well-reasoned, but some environmental groups choose to focus on issues other than protecting human safety and property from wildfires.²²⁶ Some of these groups advocate minimal government protection for property located in the wildland urban interface.²²⁷ They only support protecting property located in significant population centers.²²⁸ Their argument contends that individuals who choose to live in dangerous areas assume the inherent risks associated with their choice of residence and they should be on their own to deal with the consequences.²²⁹ Contrary to this contention, judicial precedent and public sentiment indicate that deterring this danger is tremendously important.²³⁰ Many environmental groups seem to gloss over this fundamental issue and avoid aggressively addressing the wildfire threats to human safety and property.²³¹ Failing to focus on this threat is a fatal flaw that renders the do-nothing approach unfavorable.²³² Therefore, in addition to proposing a new extraordinary circumstance²³³ and defining best available science,²³⁴ this article acknowledges that the Forest Service should sometimes selectively thin at-risk forests in the wildland urban interface.²³⁵

Well-reasoned thinning of certain at-risk forests, is preferable, but difficult to describe comprehensively. The starting point for such a definition should be the goals expressed by Congress and the President: pro-

225. *Id.* at 6 (asking the court to follow Congress's intention, as expressed in NEPA and NFMA, which requires environmental analysis and mandates taking a "hard look" at potential impacts).

226. Forest Guardian argues that the government exaggerates the fire risk due to beetle infestations, wildfires may be desirable, and thinning will not reduce wildfire threat. *Id.* at 12-16. Despite the fact that these arguments likely have biological merit, they are flawed because they do not address the reality that a few short years ago, Tenth Circuit judges, potential jurors, and politicians watched the Hayman fire on the nightly news and breathed its smoke all summer. Further, the fact that many decision makers have property in threatened areas decreases their chance for success. Arguably, environmental groups would be more successful if they recognized their audience and acknowledged that protecting people and property is paramount.

227. *Id.*

228. *All Things Considered*, *supra* note 200 (interview with Sloan Shoemaker of Colorado's Wilderness Workshop, where Shoemaker suggested that homeowners, not government, should bear the risk and assume the responsibility of living in areas with high wildfire danger).

229. *Id.*

230. Appeal of County Line, *supra* note 76, at 8-10.

231. *Id.* Courts are concerned with the underlying issue of protecting people and property against wildfires. Forest Guardians' argument would be more persuasive if it addressed mitigating the danger in an ecologically responsible manner rather than focusing on the percent of trees cut down and the effects on beetle populations. *Id.*

232. Keiter, *supra* note 1, at 316 (supporting a similar conclusion, "[o]ver the long term, these all-or-nothing approaches will not reliably restore ecologically healthy forests or safeguard adjacent communities. Thus, the real policy debate is over how and where to use prescribed fire and selective cutting to reduce fuel loads, ensure human safety, and restore forest ecosystems.").

233. See *supra* Part III.C.1.c.

234. See *supra* Part III.C.2.c.

235. See *infra* Part IV.A. But, one should remember that prescribed fires are sometimes the most effective solution to this problem, so long as they do not significantly endanger people and property.

tect human safety, protect property, and increase forest health.²³⁶ A logical approach to solving this dilemma involves two phases. Phase I addresses pre-fire projects, which mitigate wildfire conditions in the wildland urban interface by removing dead, dry trees. Phase I addresses the most urgent threats and its goal is reduction of wildfire danger to people and property in the wildland urban interface. Phase II responds to all other projects that address pre-fire fuel reduction projects. The goal of these projects is to combat less urgent threats to people and property and increase forest health.

Currently, the HFI and HFRA markedly increase the Forest Service's efficiency for projects in both proposed phases, but the price for the efficiency is too high. The Forest Service should not have such broad discretion for these projects because there is no general consensus as to the most effective method for protecting people and property from wildfires and restoring forest health. Therefore, Congress should amend the HFRA and reduce the scope of categorical exclusions.²³⁷ Congress should reinstate environmental analysis for the most impactful and expansive actions currently listed as categorical exclusions. Additionally, Congress should amend the HFRA and restore judicial oversight for all Forest Service plans, even those that remain listed as categorical exclusions.²³⁸ This is important because it would reestablish accountability for Forest Service actions and ensure that the Forest Service serves the goals of protecting people and property and restoring forest health.

236. See HFI, *supra* note 1, at 1.

237. This congressional remedy is timely because of the current political landscape. HFI and HFRA were both the product of Republican control of the Executive Branch, the House of Representatives, and Congress. The newly elected Democratic Congress may be more amenable to protecting environmental ideals. "Democrat Barbara Boxer is replacing Republican James Inhofe as chairman of the Senate Environment and Public Works Committee[.]" Froma Harrop, Red Orbit – Science – Commentary – At Last, U.S. Might Act on Global Warming, Red Orbit Breaking News, December 21, 2006, available at http://www.redorbit.com/news/science/776929/commentary_at_last_us_might_act_on_global_warming/index.html?source=r_science. Political changes such as these could mean that Congress will amend the HFRA. Congress should remove the expansive categorical exclusions enacted by HFRA and explicitly reestablish judicial oversight. If Congress desired maintaining some Forest Service discretion, it could allow for judicial review of agency regulations, but not for specific agency actions. Thus, petitioners could not challenge individual projects, but could challenge the rules that create the framework for the projects.

238. The effect of restoring judicial oversight for the plans described in this article would be de minimis because little litigation challenges pre-fire logging projects similar to these. See *supra* note 82.

*A. Phase I Projects: A New Categorical Exclusion*²³⁹

Congress should create a new categorical exclusion for projects of urgency so great that a new categorical exclusion is appropriate. These few circumstances occur when the environmental effects of projects are well-known, the risks of inaction are significant, the window for effective action is brief, and the costs associated with analysis are high.²⁴⁰ One of the circumstances that should be a categorical exclusion is selectively removing dead and dying trees in the wildland urban interface.²⁴¹ This categorical exclusion aims to protect people and their property.²⁴² When implementing these projects, the rules would require the Forest Service to utilize specific methods that increase forest health, decrease fire danger, and minimize environmental effects. Further, the rule would employ limitations similar to those on current categorical exclusions. For example, the rule would require the Forest Service to comply with the Endangered Species Act.

This categorical exclusion should incorporate significant guidelines. Most important, the Forest Service should initially commence projects close to areas with significant value, such as population centers—the higher the population, the higher the priority. Next, the Forest Service should initiate projects near other valuable areas, such as ski resorts and campgrounds. After treating forests directly adjacent to these locations, the projects should continue into the forest, creating wildfire barriers. If possible, the Forest Service should not construct new roads.²⁴³ It stands to reason that populated, at-risk areas already contain roads. If no road

239. Implementation of Phase I Projects would cost a significant amount of money, but mitigation of catastrophic fire danger in the wildland urban interface would offset some of the costs. In addition to spending significant capital on wildfire disaster relief every year, the government spends billions of dollars fighting fires. Reduction of fire danger would result in a reduction of fire fighting expenditures. In fact, some studies indicate that implementation of projects similar to those suggested in Phase I would actually save the government money. See Larry Mason et al., *Investments in Fuel Removal Avoids Public Costs*, RTI FACTSHEET 28: RURAL FOREST COMMUNITY ISSUES, May 2004, available at http://www.ruraltech.org/pubs/fact_sheets/fs028/fs_28.pdf.

240. These circumstances exist when there is a general consensus about the environmental effects of the project and concerns for safety are high.

241. Standing dead trees are vitally important for wildlife; therefore, a predetermined number of dead trees should remain. A Snagging Issue – National Wildlife Federation, <http://habitat.thecolumbiarecord.com/default.asp?item=182340> (last visited Jan. 20, 2007) (noting that “dead or downed trees in various states of decay - provide vital habitat for as many as 1200 species of wildlife nationwide. Despite the importance of snags to wildlife, many modern forestry practices encourage the removal of dead wood from the forest floor.”).

242. It is important to note that thinning in areas already affected by bark beetles does not effectively reduce bark beetle populations, but it does reduce fire threat by removing highly combustible fuel. Press Release, Tom DeGomez, *supra* note 94. After bark beetles infest a tree, they kill it and move on to the next tree, so removing a tree only reduces bark beetle populations if the tree is currently infested and if it is then burned or solarized. *Id.* Thus, the first at-risk category only addresses wildfire risks linked to bark beetles, because it will not decrease bark beetle populations. *Id.*

243. There may exist situations where insignificant road additions, like turnouts or loading areas would be necessary, but the Forest Service should mitigate any such disturbances once the project is complete; thus, allowing the forest a greater chance of recovery.

exists, it is unlikely that thinning will significantly protect the wildland urban interface.

As a general rule, this categorical exclusion should not apply to trees that do not pose a significant wildfire threat. For example, bark beetles do not infest aspens and aspens pose a very low fire threat.²⁴⁴ Thus, the Forest Service should not log aspen trees under this categorical exclusion. Finally, there should be a diameter limit for removed trees. For example, the rule would prohibit the Forest Service from removing trees with a diameter greater than twelve inches.²⁴⁵ This would remove the economic incentive to abuse the categorical exclusion. In other words, these projects would be unattractive money makers because smaller trees are worth very little. This would help ensure that the Forest Service does not dress up a timber sale as crisis intervention. Finally, these projects would be useless if the forest was not allowed to return to its natural state. Therefore, when practicable, the Forest Service should allow the reintroduction of fire and disallow grazing.

The immediate treatment of localized bark beetle outbreaks (i.e., when the beetles are still in the tree) serves as another example of an appropriate project under this categorical exclusion. If the Forest Service treats such infestations in a timely manner, it can kill the bark beetles by cutting down and burning the infested trees.²⁴⁶ This does involve cutting down a high percentage of trees in the affected area, but these trees would succumb to the bark beetles, anyway. These areas generally encompass a small geographic region; thus, a project is quite localized.²⁴⁷ Burning the trees kills the beetles and, thus, stops them from attacking other trees. The opportunity to execute this type of project is uncommon, but sometimes quite valuable.²⁴⁸ Regulations requiring in-depth analyses prevent these projects because the Forest Service has only 120 days until the beetles emerge from the trees to find and kill new host trees.²⁴⁹ The rule would require the Forest Service to complete a program Environmental Assessment, which would determine the general effects of potential future projects. This requirement would provide environmental safeguards, while allowing rapid agency response to localized outbreaks.

244. *Fire and Chainsaws*, *supra* note 31, at 5 (stating that "aspen stands are fire resistant"); Saskatchewan Forest Centre, *A Guide to Managing Community Wildfire Risk*, available at http://www.saskforestcentre.ca/uploaded/Guide_to_Managing_Community_Wildfire_Risk.pdf (noting that "[a]spen stands are one of the least volatile fuel types)."

245. The Forest Service should leave some large dead trees standing. They are important wildlife habitat for animals such as cavity nesting birds and predatory birds. See generally *Cavity-Nesting Birds of North America*, Agricultural Handbook 511 (United States Forest Service; Department of Agriculture, Washington, D.C.) November 1977, available at http://www.na.fs.fed.us/spfo/pubs/wildlife/nesting_birds/.

246. Interview with Rick Cables, *supra* note 52.

247. *Id.*

248. *Id.*

249. *Id.*

B. Phase II Projects

Pre-fire fuel reduction projects that respond to less significant threats to people and property comprise Phase II.²⁵⁰ These projects consist of essentially any pre-fire fuel reduction projects not covered under Phase I. Within the context of Phase II projects, environmental regulations and judicial oversight are more important than Forest Service efficiency. No categorical exclusions apply to these projects; compliance with NEPA and NFMA is worth the sacrifice of agency efficiency. Thus, the jurisdiction stripping and deregulatory effects of HFI and HFRA should not apply to these projects.

These projects respond to a less considerable threat, but the projects may still be important because they respond to threats to people, property, and forest health. Therefore, the Forest Service may proceed with Phase II projects, so long as they comply with NEPA and NFMA. When considering appropriate agency action in these areas, the proposed rule would require the Forest Service to consider a range of alternatives including thinning, prescribed burning, or no treatment at all. The proposed rule would also require the Forest Service to consider a hands-off approach, which would allow some wildfires to burn naturally since ecosystems recover from even the most catastrophic fire events.²⁵¹ A great example of this is Yellowstone, where the ecosystem is recovering miraculously following the 1.5 million acre fire of 1988.²⁵² The rule would require Forest Service thinning projects in Phase II forests to attempt to replicate natural events, thereby making the forest less susceptible to future bark beetle outbreak and catastrophic, widespread wildfires. An example of a project included in this phase is live tree thinning inside and outside of the wildland urban interface. These projects are useful because they decrease tree competition and can eventuate in healthier, more resistant trees.²⁵³

C. Proposed Rules' Impact on the Tenth Circuit

The proposed rules would impact litigation over logging projects and general logging practices in the Tenth Circuit. These changes would reinstitute judicial oversight and most environmental analysis eliminated by HFI and HFRA. Had such regulations been in effect, they would have prevented the Forest Service from using a categorical exclusion in

250. Phase I projects purposefully exclude dead tree removal outside the wildland urban interface and live tree thinning inside the wildland urban interface because the threat they pose fits within Phase II.

251. Yellowstone National Park -- Wildland Fire in Yellowstone (U.S. National Park Service), <http://www.nps.gov/yell/naturescience/fire.htm> (last visited Jan. 20, 2007).

252. *Id.*

253. Some basic guidelines include removing the trees after October if possible, burning or covering infected trees with plastic, and removing thrash from the forests. See Press Release, Tom DeGomez, *supra* note 94 (describing effective methods for removing dead, infested, or overly dense trees).

Utah Environmental Congress v. Bosworth.²⁵⁴ The project occurred in a very remote location; the closest population center was 22 miles away in Richfield, Utah.²⁵⁵ Richfield's population is fewer than 7,000 people.²⁵⁶ The proposed rule would require environmental analysis for such projects because they do not pose an immediate threat to person or property and they may have a cumulative effect. The new rule would have had no effect on *Ecology Center, Inc. v. United States Forest Service*.²⁵⁷ That case did not involve a categorical exclusion.²⁵⁸ The plaintiffs filed the action because the Forest Service's clear omission of Northern Goshawk as a management indicator species represented a failure to consider best available science.²⁵⁹ The result of the case would remain unchanged under the proposed rules because the Forest Service action would still represent a failure to consider the best available science.

The proposed rules re-empower the courts and individuals who wish to file a complaint. Additionally, the proposed rules require reinstitution of most environmental regulations. These rules also strengthen environmental regulations by requiring the Forest Service to consider the combined effects of many small projects. The proposed rules allow streamlined, prophylactic treatment of some at-risk areas in the wildland urban interface to continue. Therefore, projects near areas with significant value would be cheaper and faster. These projects would help curb wild-fire dangers in many communities, but they would do so under the constraints of a framework that supports long-term forest health.

In the end, the proposed rules recognize situations that warrant speedy action with abbreviated regulatory processes, but they limit these situations. The rules also recognize the congressional and presidential goals of protecting people, property, and forest health. Finally, the proposed rules do not limit the Forest Service's ability to conduct any logging projects; they simply subject the Forest Service to judicial oversight and require the Forest Service to comply with environmental regulations. The Tenth Circuit would benefit from the rules because of the positive effects on human safety, protection of property, and forest health.

CONCLUSION

There is a general consensus that the government should protect people and property and rehabilitate forest ecosystems. Conditions in lodgepole pine and ponderosa pine ecosystems render unnaturally extreme and widespread fire danger, which threaten people and property.

254. 443 F.3d 732 (10th Cir. 2006).

255. *Utah Envtl. Congress*, 443 F.3d at 737-38.

256. Richfield, Utah, <http://www.citytowninfo.com/places/utah/richfield> (last visited Jan. 20, 2007).

257. 451 F.3d 1183 (10th Cir. 2006).

258. *See Ecology Ctr.*, 451 F.3d at 1185-88.

259. *Id.* at 1195.

These forests could actually erupt into massive fires, encompassing millions of acres, and releasing the energy equivalent of atomic bombs. However, current forest dynamics make the goals of protecting people, property, and forest health very difficult. Protection requires rational land management, but authorities disagree about how to best solve the problem.

President Bush and Congress support a solution that seems destined for failure for two reasons. First, stripping the judiciary of its jurisdiction to adjudicate Forest Service actions is unwise because it creates unfettered Forest Service discretion. Second, blanket removal of the requirement to perform certain environmental analyses forebodes the reoccurrence of past failures. There are situations in which Forest Service projects should be streamlined, but those situations are limited and should be closely monitored so as to avoid their misapplication. These situations must provide a compromise between environmental issues like protecting intact ecosystems, legal issues such as maintaining jurisdiction, agency issues like retaining some discretion, and policy issues like protecting the wildland urban interface.

The Forest Service must take some action to mitigate wildfire danger. Wildfires threaten huge areas and scientists predict that devastating wildfires are probable in many forests. Many of the endangered forests are near homes and businesses. Congress should bridge the gap between science and the law by creating laws that mitigate the ramifications of a century of forest degradation. Long-term sustainability of forest ecosystems and the return to healthy forests requires careful adherence to rational standards, rather than reactive, unchecked, short-sighted actions. Therefore, careful, selective thinning in areas where humans and their property are at risk is the most reasonable course of action. This protects the public from wildfires and envisions the future. The Tenth Circuit should require Forest Service projects to comply with the legislative intent of protecting people, property, and forest health. The proposed definition of best available science, a new extraordinary circumstance, and amendments to the list of categorical exceptions would satisfy the public policy interest of protecting people and their property.

*Joshua Nathaniel**

* J.D. Candidate, May 2008, University of Denver Sturm College of Law. The author would like to thank Federico Cheever, Professor of Law at the University of Denver Sturm College of Law and Jay Tutchton, Director, Environmental Law Clinic at the University of Denver Sturm College of Law for their willingness to patiently share their wisdom.

THE ONGOING STRUGGLE TO DETERMINE FEDERAL “ARISING UNDER” JURISDICTION IN COPYRIGHT: THE COMPLETE PREEMPTION EXCEPTION TO THE WELL PLEADED COMPLAINT RULE

INTRODUCTION

Copyright is one of the oldest institutionally protected rights in the United States. The notion of federally protected copyright originated in the United States Constitution in 1787.¹ One of the powers the Constitution grants to Congress is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”² What is omitted from these instructions is how the government should promote progress and protect rights. To what extent must the government protect these rights? How can citizens raise grievances that their rights have been infringed upon? Who should hear and adjudicate these grievances?

Although copyright was not a prominent issue in the early years of the republic, advances in technology have greatly increased the number and variety of actual and potential copyright cases. Cases involving copyright issues present one persistent jurisdictional question: what makes a copyright case a federal case? Copyright owners regularly license or assign their rights in contractual agreements and the breach of such an agreement may give rise to a breach of contract claim, a claim for copyright infringement, or both. Pursuant to 28 U.S.C. § 1338(a), the federal courts have exclusive jurisdiction over copyright cases.³ Yet determining when a case is a “copyright” case is not always straightforward.

Infringement of copyright is a violation of the federal Copyright Act and therefore a federal claim.⁴ However, breach of contract is a state law cause of action and therefore undeserving of federal jurisdiction.⁵ In response to claims brought under state law, the defendant may assert counterclaims or defenses based in federal copyright law. In this con-

1. U.S. CONST. art. I, § 8, cl. 8.

2. *Id.*

3. See 28 U.S.C.A. § 1338(a) (West 2007) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.”).

4. 17 U.S.C.A. § 501(a) (West 2007).

5. See generally *Ritchie v. Williams*, 395 F.3d 283, 285 (6th Cir. 2005) (delineating between state and federal causes of action in a copyright case).

text, a court must determine whether the case properly belongs in state or federal court.

In 1964, the United States Court of Appeals for the Second Circuit established a test for determining whether a copyright claim deserves federal jurisdiction. In *T.B. Harms Co. v. Eliscu*,⁶ the court attempted to formulate a rule to resolve “whether and how a complaint implicates the Copyright Act.”⁷ The three-part *T.B. Harms* test was praised by leading copyright scholars⁸ but also suffered from a variety of misinterpretations and was subsequently applied by various courts in a contradictory manner.⁹ Only in 2000 did the Second Circuit emerge from this confusion to clarify the *T.B. Harms* test and promulgate the well pleaded complaint rule as the standard for determining federal copyright jurisdiction.¹⁰ In 2002 the United States Supreme Court reaffirmed the primacy of the well pleaded complaint rule for determining whether cases garner federal jurisdiction under § 1338(a).¹¹

While it might appear that all federal courts should fall into line with the Supreme Court, some circuits have not adopted the rule. The United States Court of Appeals for the Tenth Circuit did not address the question of what test to apply to determine jurisdiction in a copyright suit until *Image Software, Inc. v. Reynolds & Reynolds Co.*¹² in 2006. Absent a Supreme Court opinion on the use of the well pleaded complaint rule in the copyright context, there continues to be noteworthy scholarly discourse questioning the wisdom of the rule.

Although the well pleaded complaint rule has distinct weaknesses, it remains the best standard for determining federal jurisdiction in copyright cases. The developing complete preemption doctrine—when applied in the copyright contexts—ameliorates one of the well pleaded complaint rule’s significant weaknesses. Complete preemption applies when the force of a federal statute is so extraordinary that it converts a state law complaint into a federal claim.¹³ State law claims that are equivalent to copyright infringement claims can be completely preempted by the Copyright Act and removed to federal court even if they do not state a federal claim.¹⁴

6. 339 F.2d 823 (2d Cir. 1964).

7. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 348 (2d Cir. 2000) (citing *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 825 (2d Cir. 1964)).

8. *Bassett*, 204 F.3d at 349 (citing 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 12.01[A]).

9. *Bassett*, 204 F.3d at 351 n.4.

10. *Id.* at 355.

11. *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002).

12. 459 F.3d 1044 (10th Cir. 2006).

13. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)).

14. *Ritchie*, 395 F.3d at 286-87.

Applying the complete preemption doctrine as an exception to the well pleaded complaint rule provides a practical solution to some of the well pleaded complaint rule's shortcomings. It addresses concerns about these shortcomings while still achieving the desired consistency and uniformity that the well pleaded complaint rule provides.

Part I of this article describes the case law addressing whether a case "arises under" the Copyright Act and therefore enjoys federal jurisdiction. This part focuses on significant copyright decisions handed down by the Second Circuit Court of Appeals. Part II describes *Image Software, Inc. v. Reynolds & Reynolds Co.*¹⁵ and the Tenth Circuit's adoption of the Second Circuit's well pleaded complaint rule in copyright cases. Part III identifies the Supreme Court's guidance in establishing the well pleaded complaint rule and the frequent intersection of contract and copyright claims.

Part IV analyzes the underpinnings of the well pleaded complaint rule and identifies arguments supporting the rule and promoting uniformity among the federal courts in determining copyright jurisdiction. Part IV goes on to note the shortcomings of competing standards and address arguments against the rule. In an effort to tackle a significant weakness of the well pleaded complaint rule, this article suggests applying the complete preemption doctrine as an exception to the well pleaded complaint rule.

I. THE SECOND CIRCUIT'S REIGN IN "ARISING UNDER" COPYRIGHT JURISPRUDENCE

A. *The Groundwork*

Article I of the Constitution provides Congress the power to secure to authors and inventors the exclusive rights to their works.¹⁶ Under Article III, the federal judiciary is given the power to adjudicate all cases arising under the Constitution and the laws of the United States.¹⁷ Congress established copyrights in the early years of the republic and, through the Copyright Act of 1976,¹⁸ gave the federal courts exclusive jurisdiction over copyright claims.¹⁹

Congress established federal jurisdiction over copyright claims in 28 U.S.C. § 1338(a): "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety pro-

15. 459 F.3d 1044 (10th Cir. 2006).

16. U.S. CONST. art I, § 8, cl. 8.

17. U.S. CONST. art III, § 2, cl. 1.

18. 17 U.S.C.A. §§ 101-810 (West 2007).

19. 17 U.S.C.A. § 301(a).

tection and copyright cases.”²⁰ Courts have wrestled with the meaning of “arising under” in the copyright framework since the enactment of § 1338(a).²¹ There has been an ongoing struggle to define exactly when a claim “arises under” the Copyright Act and therefore garners federal jurisdiction.²² A suit that simply mentions or involves copyright does not necessarily “arise under” the Copyright Act and therefore does not necessarily come before a federal court.²³

Although the United States Supreme Court has yet to consider the definition of “arising under” in the realm of copyright,²⁴ it has decided cases addressing § 1338(a)’s “arising under” language.²⁵ *American Well Works Co. v. Layne & Bowler Co.*²⁶ involved a patent claim that began in state court, was removed to federal district court, and appealed to the Supreme Court.²⁷ Justice Holmes explained that “[a] suit arises under the law that creates the cause of action.”²⁸ The plaintiff in *American Well Works* did not seek relief under federal patent law and the Court therefore ruled that it belonged in state court.²⁹ Justice Holmes’ concise statement laid a foundation for approaches to “arising under” jurisdiction in copyright as well as patent cases.³⁰

B. *T.B. Harms Company v. Eliscu*

Almost fifty years after Justice Holmes discussed the “arising under” language in § 1338(a), the Second Circuit Court of Appeals addressed the issue in *T.B. Harms Co. v. Eliscu*.³¹ The court’s decision subsequently suffered a variety of interpretations and ignited a polarized scholarly debate that continues to smolder.

The T.B. Harms Company brought an action for declaratory judgment and equitable relief in the District Court for the Southern District of New York, claiming that under a contract with Eliscu, Harms owned renewal copyrights in songs Eliscu co-authored.³² The plaintiff asserted

20. 28 U.S.C.A. § 1338(a) (West 2007).

21. Christopher D. Birrer, *A Jurisdictional “Nightmare”: Determining When an Interdependent Copyright and Contract Claim “Arises Under” the Copyright Act in Scholastic Entertainment, Inc. v. Fox Entertainment Group, Inc.*, 11 VILL. SPORTS & ENT. L.J. 271, 276 (2004).

22. James M. McCarthy, *Federal Subject Matter Jurisdiction: When Does a Case Involving the Breach of a Copyright Licensing Contract “Arise Under” the Copyright Act?*, 19 DAYTON L. REV. 165, 169 (1993).

23. *Id.*

24. Amy B. Cohen, “*Arising Under*” Jurisdiction and the Copyright Laws, 44 HASTINGS L.J. 337, 351 (1993).

25. See *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); *Holmes Group, Inc.*, 535 U.S. at 829-30.

26. 241 U.S. 257 (1916).

27. *Am. Well Works*, 241 U.S. at 258.

28. *Id.* at 260.

29. *Id.*

30. Daniel E. Wanat, *Copyright and Contracts: The Subject Matter Jurisdiction of Federal Courts Under 28 U.S.C. 1338(a)*, 11 DEPAUL-LCA J. ART & ENT. L. & POL’Y 361, 366 (2001).

31. 339 F.2d 823 (2d Cir. 1964).

32. *T.B. Harms*, 339 F.2d at 824-25.

federal jurisdiction subject to § 1338(a) and the defendants moved to dismiss for failure to state a claim upon which relief could be granted and lack of federal jurisdiction.³³ The district court judge dismissed the complaint for lack of federal jurisdiction and Harms appealed.³⁴

Writing for the Second Circuit Court of Appeals, Judge Friendly acknowledged the utility of Justice Holmes' *American Well Works* test in explaining federal jurisdiction in "a great many cases, notably copyright and patent infringement actions."³⁵ Yet, noting that Holmes' formula was "more useful for inclusion than for the exclusion for which it was intended," Friendly found that "Harms' claim [wa]s not within Holmes' definition."³⁶

Facing a need for clarification and mindful of how difficult it was to formulate, the Second Circuit arrived at a three-part test for establishing when an action "arises under" the Copyright Act.³⁷ Federal jurisdiction shall be conferred

if and only if the complaint is for a remedy expressly granted by the Act . . . or asserts a claim requiring construction of the Act . . . or, at the very least and more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.³⁸

Judge Friendly noted that federal jurisdiction is held to exist when a claim is brought for copyright infringement but also observed that "the jurisdictional statute does not speak in terms of infringement, and the undoubted truth that a claim for infringement 'arises under' the Copyright Act does not establish that nothing else can."³⁹ Friendly went on to examine the ways in which federal jurisdiction might be appropriate for Harms' claims, including if the complaint showed a need for determining the meaning or application of a federal law.⁴⁰ Federal jurisdiction could even be found where the issue might seem to be one of local law as long as the federal interest was dominant.⁴¹ *T.B. Harms* became the leading case on how and whether a claim "arises under" the Copyright Act.⁴²

33. *Id.* at 825.

34. *Id.*

35. *Id.* at 826.

36. *Id.* at 827.

37. *Id.* at 828.

38. *Id.*

39. *T.B. Harms*, 339 F.2d at 825.

40. *Id.* at 827.

41. *Id.* at 827-28.

42. McCarthy, *supra* note 22, at 169.

C. *The T.B. Harms Fallout*

Many courts relied on the *T.B. Harms* test to determine federal copyright jurisdiction,⁴³ but the application was inconsistent.⁴⁴ Interpretations of the opinion ultimately crystallized into two general jurisdictional tests: the "well pleaded complaint" rule⁴⁵ and the "essence test."⁴⁶

The well pleaded complaint approach determines jurisdiction solely on the pleadings submitted by the plaintiff and views the surrounding circumstances of the suit as irrelevant to the choice of jurisdiction.⁴⁷ The well pleaded complaint standard follows from the first facet of the *T.B. Harms* test, which allows federal jurisdiction "if the complaint is for a remedy expressly granted by the Act."⁴⁸ There is also support for this standard in the Second Circuit's determination that federal jurisdiction exists when the plaintiff's pleading is directed toward infringement and not the license itself.⁴⁹

In contrast, the essence test attempts to distill the "essence" of the claim as a basis for jurisdictional determination.⁵⁰ Under this standard, courts should establish the "essence" of the plaintiff's claim and only grant federal jurisdiction to matters of legitimate federal significance.⁵¹ Development of the essence test can also be traced to language in the *T.B. Harms* case. First, the *T.B. Harms* district court explained that the formal allegations must yield to the substance of the claim.⁵² The "mere circumstance" that the suit "incidentally" centered on copyright did not, on its own, justify federal jurisdiction.⁵³ Second, Judge Friendly instructed that provisions conferring federal jurisdiction should be read narrowly to avoid depriving state courts of jurisdiction over cases that have little federal significance.⁵⁴ Under the essence test, courts should look beyond the face of the complaint to determine the "essence" of the claim and only allow federal jurisdiction where the thrust of the case "arises under" the Copyright Act.

43. Cohen, *supra* note 24, at 362.

44. *Id.*

45. Birrer, *supra* note 21, at 286.

46. McCarthy, *supra* note 22, at 179.

47. Cohen, *supra* note 24, at 371-72. This standard is also applied to other areas of federal jurisdiction to determine whether a complaint "arises under" federal law.

48. McCarthy, *supra* note 22, at 175 (citing *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 828 (2nd Cir. 1964)).

49. *Id.* (citing *T.B. Harms*, 329 F.2d at 828).

50. *Id.*

51. *Id.*

52. *Id.*

53. *T.B. Harms Co. v. Eliscu*, 226 F. Supp. 337, 338 (S.D.N.Y. 1964).

54. Birrer, *supra* note 21, at 283.

D. Schoenberg v. Shapolsky Publishers

After twenty-eight years of conflicting decisions,⁵⁵ in 1992 the Second Circuit adopted the essence test in *Schoenberg v. Shapolsky Publishers*.⁵⁶ Harris Schoenberg, an author, brought a federal suit against his publisher for breach of their publication agreement and infringement on his copyrighted work.⁵⁷ The defendants' former attorney appealed his conviction for contempt and questioned the jurisdiction of the federal district court.⁵⁸

Referring to select previous Second Circuit decisions,⁵⁹ the *Schoenberg* court determined that a district court may "refer to evidence outside of the pleadings" to decide subject matter jurisdiction.⁶⁰ This conflicted with *American Well Works*⁶¹ as well as an earlier Justice Holmes decision which explained that "the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the . . . law of the United States by his declaration or bill."⁶²

Schoenberg advocated a three-part essence test to "clarify the proper approach" for determining whether a suit "arises under" the Copyright Act and therefore deserves federal jurisdiction.⁶³ First, the court must ascertain whether an infringement claim is only "incidental" to a determination of ownership or rights under a copyright.⁶⁴ If the claim is not merely incidental, the court must examine whether the complaint alleges a breach of the contract licensing or assigning the copyright.⁶⁵ If such a breach is alleged, there is federal jurisdiction, but if the complaint merely alleges a breach of contract then the court must endeavor to take a third step.⁶⁶ If the breach was so material as to create a right of rescission in the grantor, then the claim arises under the Copyright Act.⁶⁷

The *Schoenberg* court acknowledged that the last two steps would often determine the "essence" of the claim and that, "in practice," the

55. Wanat, *supra* note 30, at 385-86.

56. 971 F.2d 926 (2d Cir. 1992).

57. *Schoenberg*, 971 F.2d at 928.

58. *Id.* at 930.

59. *Schoenberg*, 971 F.2d at 932 (citing *T.B. Harms*, 226 F. Supp. at 337; *Costello Pub. Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981); *Berger v. Simon & Schuster*, 631 F. Supp. 915 (S.D.N.Y. 1986)).

60. *Schoenberg*, 971 F.2d at 933.

61. 241 U.S. 257 (1916).

62. Edwin E. Richards, *Drafting Licenses to Guide Whether Potential Disputes Lie in Contract or Infringement*, 7 COMP. L. REV. & TECH J. 45, 50 (2002) (citing *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)).

63. *Schoenberg*, 971 F.2d at 932.

64. *Id.*

65. *Id.*

66. *Id.* at 932-33.

67. *Id.* at 933.

three steps would merge into one.⁶⁸ Despite the Second Circuit's effort to clarify the law, the *Schoenberg* essence test was met with criticism⁶⁹ and was eventually invalidated.⁷⁰

E. Basset v. Mashantucket Pequot Tribe

In *Basset v. Mashantucket Pequot Tribe*⁷¹ the Second Circuit responded to criticisms and rejected the essence test that it established in the *Schoenberg* decision.⁷² Debra Basset contracted to produce a film for the Mashantucket Pequot Tribe in an agreement that granted Basset exclusive rights to the film.⁷³ After Basset wrote and delivered a script, the tribe told Basset that it was terminating the agreement.⁷⁴ The tribe continued to pursue production of the film and Basset brought suit seeking an injunction and other copyright remedies.⁷⁵

The *Basset* court reviewed the *T.B. Harms* opinion,⁷⁶ addressed criticisms of that decision,⁷⁷ and then questioned the wisdom of *Schoenberg*.⁷⁸ The court identified a number of shortcomings in finding the essence test "unworkable."⁷⁹ First, the court noted the perverse possibility that, under *Schoenberg*, only those cases with a strong defense would warrant federal jurisdiction.⁸⁰ A court could deny a plaintiff a federal forum and, therefore, the benefit of copyright remedies because her copyright claims were incidental to her contract dispute.⁸¹ "A plaintiff with meritorious copyright claims and entitlement to the special remedies provided by the Act [could be] deprived of these remedies merely because the first hurdle of proving entitlement is a showing of a contractual right."⁸²

The *Basset* court identified a second *Schoenberg* shortcoming: the essence test is "based more on the defense than on the demands asserted in the complaint."⁸³ A plaintiff might not be able to establish whether to file her complaint in federal or state court because the jurisdictional determination would be based on the defendant's response.⁸⁴ Furthermore, a court might not know the "essence" of the plaintiff's claim simply

68. *Id.*

69. *Birrer*, *supra* note 21, at 292-93.

70. *Id.* at 288.

71. 204 F.3d 343 (2d Cir. 2000).

72. *Birrer*, *supra* note 21, at 288.

73. *Basset*, 204 F.3d at 346.

74. *Id.*

75. *Id.*

76. *Id.* at 348-51.

77. *Id.* at 351 n.4.

78. *Id.* at 352-55.

79. *Id.* at 352.

80. *Richards*, *supra* note 62, at 49.

81. *Basset*, 204 F.3d at 352.

82. *Id.* at 352-53.

83. *Id.* at 353.

84. *Id.*

based on the complaint.⁸⁵ The *Basset* court felt that this inability to predict jurisdiction under the essence test was a “major problem.”⁸⁶

A final shortcoming of the essence test is that it “requires the court to make complex factual determinations relating to the merits at the outset of the litigation—before the court has any familiarity with the case.”⁸⁷ Such determinations could “require extensive hearings and fact finding” and could recur “at each stage of Schoenberg’s three-step formula.”⁸⁸ The *Basset* court expressed concern that jurisdiction would be decided by determining the “essence” of the claim even though the “essence” could not be determined solely on the pleadings.⁸⁹

After rejecting the essence test, the court went on to establish the well pleaded complaint rule for determining jurisdiction in copyright cases.⁹⁰ The court harkened back to Justice Holmes’ *American Well Works* decision in maintaining that “a suit arises under the law that creates the cause of action”⁹¹ and that jurisdiction should be based upon the content of the plaintiff’s complaint.⁹² This established the well pleaded complaint rule as the standard for determining federal “arising under” jurisdiction in copyright. The court determined that because *Basset*’s complaint alleged a violation of the Copyright Act and sought injunctive relief provided by the Act, the action deserved federal jurisdiction.⁹³

II. *IMAGE SOFTWARE, INC. V. REYNOLDS & REYNOLDS CO.*

While a number of federal circuits have adopted the well pleaded complaint rule in copyright, the United States Court of Appeals for the Tenth Circuit only recently enunciated its stance on federal “arising under” jurisdiction for copyright claims. In *Image Software, Inc. v. Reynolds & Reynolds Co.*,⁹⁴ the court took the opportunity to adopt the well pleaded complaint rule for determining whether a copyright case arises under the laws of the United States.

A. Facts

Plaintiff Image Software Inc. (“Image”) developed imaging software to capture and archive business reports, alleviating the need for handling paper documents.⁹⁵ Defendant Reynolds and Reynolds Com-

85. *Id.* at 353-54.

86. *Id.* at 354 n.11 (citing Cohen, *supra* note 24, at 374).

87. *Bassett*, 204 F.3d at 354.

88. *Id.*

89. Wanat, *supra* note 30, at 390.

90. *Bassett*, 204 F.3d at 352-55.

91. *Id.* at 355 (citing *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

92. *Bassett*, 204 F.3d at 355 (citing *Taylor v. Anderson*, 234 U.S. 74, 75 (1914)).

93. *Bassett*, 204 F.3d at 355-56.

94. 459 F.3d 1044 (10th Cir. 2006).

95. *Image Software, Inc. v. Reynolds & Reynolds Co.*, 273 F. Supp. 2d 1168, 1169 (D. Colo. 2003).

pany ("Reynolds") aimed to market Image's product to car dealerships and entered into a licensing agreement with Image⁹⁶ to this end.⁹⁷ Pursuant to a 1994 agreement, Image sold Reynolds perpetual and non-exclusive licenses to the software for a one-time fee.⁹⁸ Image granted Reynolds the right to use, market, and distribute the software⁹⁹ and agreed to make subsequent upgrades available to Reynolds for an arranged fee.¹⁰⁰

In 1996, Image and Reynolds entered into a subsequent agreement, providing Reynolds with an updated version of the software, Release 5.5.¹⁰¹ The 1996 agreement also allowed either party to terminate the license upon ninety days notice.¹⁰² Reynolds terminated the agreement in 2002, and Image informed Reynolds that Reynolds could no longer use the licensed software.¹⁰³ Reynolds, however, continued to use and distribute Release 5.5. Image brought suit, charging that Reynolds' use infringed on Image's copyright.¹⁰⁴

Pursuant to an arbitration clause in the 1994 agreement, Reynolds filed a motion to stay federal litigation and compel arbitration.¹⁰⁵ The district court granted the arbitration motion, an arbitrator granted Reynolds almost \$400,000 in damages, and the district court confirmed the arbitrator's order.¹⁰⁶ Image subsequently appealed, challenging the district court's order and jurisdiction.¹⁰⁷

B. Decision

In addressing the issue of subject matter jurisdiction, the Tenth Circuit Court of Appeals noted that although the parties in the case never questioned the federal courts' jurisdiction, the district court rightfully raised the issue sua sponte.¹⁰⁸ The district court invoked federal jurisdiction under 28 U.S.C. § 1331¹⁰⁹ and 28 U.S.C. § 1338(a)¹¹⁰ and determined that the complaint pled a federal copyright claim.¹¹¹ The district

96. *Image*, 273 F. Supp. 2d at 1169. The agreement was executed by ISI, parent company of Image. *Id.*

97. *Image*, 459 F.3d at 1047.

98. *Image*, 273 F. Supp. 2d at 1169.

99. *Image*, 459 F.3d at 1047.

100. *Image*, 273 F. Supp. 2d at 1169-70.

101. *Image*, 459 F.3d at 1047.

102. *Id.*

103. *Id.*

104. *Image*, 273 F. Supp. 2d at 1170.

105. *Image*, 459 F.3d at 1047.

106. *Id.* at 1047-48.

107. *Id.*

108. *Id.*

109. 28 U.S.C.A. § 1331 (West 2007) ("[D]istrict courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

110. 28 U.S.C.A. § 1338(a). ("[D]istrict courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.")

111. *Image*, 273 F. Supp. 2d at 1171.

court applied the well pleaded complaint rule and found that it had subject matter jurisdiction because *Image* had requested relief under the federal Copyright Act.¹¹² The district court relied on *Basset v. Mashantucket Pequot Tribe*,¹¹³ and the Tenth Circuit affirmed, taking the “opportunity to adopt the Second Circuit’s analytical approach.”¹¹⁴ The Tenth Circuit’s decision quotes liberally from *Basset* in embracing the well pleaded complaint rule as “[t]he most frequently cited test” for determining whether an action arises under the Copyright Act.¹¹⁵

In adopting the Second Circuit test, the court engaged in a retelling of the history of *Basset*, including a recitation of the problems with the essence test.¹¹⁶ The court also recounted a more recent Ninth Circuit decision that similarly adopted the well pleaded complaint rule.¹¹⁷ Applying the Second Circuit’s well pleaded complaint rule to the *Image* case, the Tenth Circuit agreed with the lower court decision and affirmed that the federal courts had subject matter jurisdiction over *Image*’s copyright claim.¹¹⁸

III. JUDICIAL AND LEGISLATIVE UNDERPINNINGS OF THE WELL PLEADED COMPLAINT RULE

There is a history of Supreme Court support for applying the well pleaded complaint rule to determine jurisdiction for cases “arising under” federal laws such as § 1338(a).¹¹⁹ The Court recently reaffirmed that the well pleaded complaint rule should be applied to cases questioning patents in *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*¹²⁰ This rule should also apply to copyright because patent and copyright are treated similarly under § 1338(a).¹²¹ In addition, acts of Congress suggest that the well pleaded complaint rule should determine jurisdictional questions in copyright cases.

A. Supreme Court Support

The United States Supreme Court recently affirmed the primacy of the well pleaded complaint rule and established a solid statutory foundation for its application.¹²² Although *Holmes Group, Inc. v. Vornado Air*

112. *Id.*

113. 204 F.3d 343 (2d Cir. 2000).

114. *Image*, 459 F.3d at 1049.

115. *Id.* (quoting *Gener-Villar v. Adcom Group, Inc.*, 417 F.3d 201, 203 (1st Cir. 2005)).

116. *Image*, 459 F.3d at 1050.

117. *Id.* at 1050 n.7 (citing *Scholastic Entm’t, Inc. v. Fox Entm’t Group, Inc.*, 336 F.3d 982, 985-86 (9th Cir. 2003)).

118. *Image*, 459 F.3d at 1051.

119. *See* *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 258, 260 (1916).

120. 535 U.S. 826, 830 (2002).

121. *See* 28 U.S.C.A. § 1338(a) (West 2007) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.”). In construing “arising under” jurisdiction for § 1338(a), the *Holmes Group* decision applies to patents, plant variety protection, copyrights, and trademarks. *Id.*

122. *Holmes Group*, 535 U.S. at 830.

Circulation Systems, Inc., addressed a patent law claim,¹²³ the ruling applies to copyright because both areas of law are addressed in § 1338(a).¹²⁴ In *Holmes Group*, the Court noted that the strength of § 1338(a) draws from its "linguistic consistency" with § 1331,¹²⁵ which confers federal jurisdiction on "all civil actions arising under the Constitution, laws or treaties of the United States."¹²⁶

The Court in *Holmes Group* stated that "the well-pleaded-complaint rule has long governed whether a case 'arises under' federal law for purposes of § 1331."¹²⁷ The "arising under" language is the same in § 1331 and § 1338(a) so the well pleaded complaint rule should determine jurisdiction in § 1338(a) cases as well. The Court bolstered its support of the well pleaded complaint rule by noting that to allow a counterclaim to establish "arising under" jurisdiction would "contravene the longstanding policies underlying our precedents."¹²⁸ Although the Tenth Circuit did not cite *Holmes Group* in its *Image* decision, deliberate adoption of the well pleaded complaint rule brings the Tenth Circuit into line with the high court's prevailing decision.

As the *Holmes Group* court explained, the "linguistic consistency" of §§ 1331 and 1338(a) provides statutory support for the well pleaded complaint rule.¹²⁹ It establishes uniformity between "arising under" jurisdiction for copyright claims under § 1338(a) and general "arising under" jurisdiction for all cases of original federal jurisdiction under § 1331. This, in turn, maintains the primacy of the well pleaded complaint rule by requiring that all cases garnering federal jurisdiction "arise under" federal law.

B. The Statutory Outlook

Is § 1338(a) necessary if it grants jurisdiction identical to § 1331? Section 1331 grants original federal jurisdiction to any case arising under the laws of the United States.¹³⁰ Section 1338(a)—granting the same jurisdiction but referring to patents, plant variety, copyrights and trademarks—seems redundant. The reason for these different provisions is not clear. One may conclude that the use of the well pleaded complaint rule for cases "arising under" § 1331 implies the use of the rule for cases

123. *Id.*

124. See 28 U.S.C.A. § 1338(a).

125. *Holmes Group*, 535 U.S. at 829-30 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

126. 28 U.S.C.A. § 1331.

127. *Holmes Group*, 535 U.S. at 830 (citing *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28 (1974) (per curiam)).

128. *Holmes Group*, 535 U.S. at 831.

129. *Id.* at 829-30.

130. 28 U.S.C.A. § 1331.

“arising under” § 1338(a).¹³¹ The broad use of the well pleaded complaint rule for all federal questions under § 1331 supports the consistent use of the rule for questions involving copyright.

The Copyright Act of 1976 established exclusive federal jurisdiction for all copyright claims and made copyright law federal law.¹³² Since § 1331 grants original federal jurisdiction to all claims arising under federal law and all copyright claims arise under federal law, the use of the well pleaded complaint rule for § 1331 questions implies its use for copyright questions. This statutory consistency provides further support for the use of the well pleaded complaint rule in determining copyright jurisdiction.

C. Copyright and Contract

The frequent relationship between copyright and contract is inextricably related to the discussion of “arising under” jurisdiction and the well pleaded complaint rule. Copyright owners regularly use contracts to license or assign their rights.¹³³ Disputes relating to these contracts arise and some of these disputes result in lawsuits. If one of the parties seeks federal jurisdiction, the court must use the well pleaded complaint rule to determine whether the suit “arises under” the Copyright Act.¹³⁴

There is an inherent tension between state and federal law in copyright claims because the breach of a license or assignment of a copyright may raise a contract claim (state law), a claim of infringement (federal law), or both. Courts must focus on the plaintiff’s allegations to determine whether the dispute is primarily a federal concern, outweighing the issues of state contract law.¹³⁵

In general, courts have held that a suit by a copyright holder for royalties under a license or agreement does not arise under the copyright laws of the United States and does not deserve federal jurisdiction.¹³⁶ In *T.B. Harms*, Judge Friendly suggested a situation where the plaintiff licensed his copyright and the defendant forfeited the grant.¹³⁷

[I]n such cases federal jurisdiction is held to exist if the plaintiff has directed his pleading against the offending use, referring to the license only by way of anticipatory replication, but not if he has sued

131. John Donofrio & Edward C. Donovan, *Christianson v. Colt Industries Operating Corp.: The Application of Federal Precedent to Federal Circuit Jurisdiction Decisions*, 45 AM. U. L. REV. 1835, 1837-38 (1996).

132. 17 U.S.C.A. § 301(a) (West 2007).

133. See 17 U.S.C.A. § 201(d); McCarthy, *supra* note 22, at 165 n.2.

134. *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1051 (10th Cir. 2006).

135. Cohen, *supra* note 24, at 392-94.

136. See *Lockett v. Delpark, Inc.*, 270 U.S. 496, 502 (1926) (stating a general rule for patent which concurrently applies to copyright).

137. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 825 (2d Cir. 1964).

to set the license aside, seeking recovery for unauthorized use only incidentally or not at all.¹³⁸

Friendly explained that, in order to garner federal jurisdiction, a copyright claim must allege infringement and offending use and not breach of the contract that originally permitted the use.¹³⁹

The scenario Judge Friendly envisioned matches the circumstances of *Image*. *Image* and Reynolds had an agreement licensing *Image*'s software, Reynolds terminated the agreement, and *Image* brought suit alleging infringement.¹⁴⁰ These circumstances demonstrate the importance of following the well pleaded complaint rule. A plaintiff alleging copyright infringement, not breach of the licensing agreement or assignment, deserves federal jurisdiction. A complaint that raises state claims belongs in state court.

IV. THE WELL PLEADED COMPLAINT RULE AND THE FUTURE OF COPYRIGHT JURISDICTION

In spite of some weaknesses—discussed below—the well pleaded complaint rule remains the majority rule for determining jurisdiction for copyright claims. The well pleaded complaint rule maintains the long-held principle that the plaintiff is master of his complaint, it encourages uniformity in determining the venue for copyright claims, and it is the better choice when viewed in light of the shortcomings of the essence test. However, use of the well pleaded complaint rule may fail to result in federal jurisdiction for state contract claims that implicate significant copyright issues and therefore belong in federal court. This article proposes an exception to the rule to ameliorate this problem.

A. Importance of the Well Pleased Complaint Rule

1. Plaintiff as Master of His Complaint

It is well established that the plaintiff is the master of his complaint.¹⁴¹ As such, the plaintiff has complete discretion in choosing where to bring his case. A plaintiff praying for state court adjudication is given deference in electing to bring a state, not federal, claim.¹⁴² The essence test allows a defendant to frustrate the plaintiff's choice of a state forum by raising a federal issue in a counterclaim.¹⁴³ A defendant should not be allowed to defeat a plaintiff's choice of a state court forum simply

138. *T.B. Harms*, 339 F.2d at 825.

139. *See id.*

140. *Image*, 459 F.3d at 1047.

141. *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)).

142. Cohen, *supra* note 24, at 382-83.

143. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 349 (2d. Cir. 2000).

by including a federal counterclaim.¹⁴⁴ The well pleaded complaint rule rightly places the plaintiff in charge of his suit by allowing him to choose the jurisdiction in which he will be heard.

The creativity of a defendant's response should not be allowed to alter a plaintiff's choice of venue. To permit the defendant to deliberately frustrate the plaintiff's prerogative undermines the balance of power in the adversary system. The well pleaded complaint rule maintains a plaintiff's right to determine the whether a state or federal court will resolve the dispute.

2. Uniformity

Another advantage of the well pleaded complaint rule is that it provides uniformity for the courts and the parties. There are a host of reasons why uniformity is desirable and this article will highlight four such reasons: doctrinal stability, equal treatment across the federal system, the desirability of appearing before judges with expertise in particular areas of law, and discouraging forum shopping and gamesmanship.

The well pleaded complaint rule promotes uniformity in the application of copyright law by granting federal jurisdiction only to litigants whose prayer for relief "arises under" copyright on the face of the complaint. By ensuring that federal courts are the exclusive forum for genuinely pled copyright cases, the rule increases consistency.¹⁴⁵ The rule allows parties to consistently determine where their case will be heard; allowing the federal courts to have a monopoly on copyright law helps to maintain a desirable level of doctrinal stability.¹⁴⁶ The well pleaded complaint rule directs only appropriate copyright cases to the federal courts in the spirit of true federal "arising under" jurisdiction.

Uniformity in the application of federal law increases the likelihood that similarly situated parties will receive equal treatment.¹⁴⁷ The Supreme Court has repeatedly recognized that this consistency is desirable.¹⁴⁸ Equal treatment is an ideal for which all levels of American justice strive. It is a fundamental tenet of the legal system that "like cases should be treated alike."¹⁴⁹ Universal adoption of the well pleaded complaint rule makes it more likely that copyright litigants can expect reliable jurisdictional results anywhere in the federal court system.

144. *Holmes Group*, 535 U.S. at 831-32.

145. Christopher A. Cotropia, *Counterclaims, the Well Pleased Complaint, and Federal Jurisdiction*, 33 HOFSTRA L. REV. 1, 38 (2004).

146. *Id.*

147. *Id.*

148. *Id.* (citing Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 615 (1987)).

149. Joan E. Schaffner, *Federal Circuit "Choice of Law": Erie Through the Looking Glass*, 81 IOWA L. REV. 1173, 1207 (1996).

Another benefit of uniformity in federal question jurisdiction is that it puts copyright disputes in the hands of judges with expertise in the area.¹⁵⁰ Funneling copyright cases to the federal courts benefits all parties because federal judges are better equipped to adjudicate disputes involving questions of federal copyright law. Application of the well pleaded complaint rule ensures that federal copyright cases are only heard by federal judges. Litigants will be better served by federal judges applying federal law when deciding federal copyright cases.

Uniformity in determining copyright jurisdiction will also discourage parties from forum shopping. If the fair resolution of a claim hinges upon whether a court favors the well pleaded complaint rule or the essence test, forum shopping will result. Different circuits applying different standards for resolving copyright jurisdiction allows litigants to manipulate the administration of justice.¹⁵¹ There are inherent inequities in a system where a plaintiff can expect to find federal jurisdiction for his claim in one circuit while being relegated to state court in another circuit. This could lead to venue bias, disharmony, and unequal treatment.

The *Image* decision increases uniformity by bringing the Tenth Circuit into line with other circuits that have adopted the well pleaded complaint rule for determining “arising under” copyright jurisdiction.¹⁵² The *Image* court noted that it had previously endorsed the well pleaded complaint standard in *Ausherman v. Stump*.¹⁵³ In that 1981 decision, the Tenth Circuit found that a patent infringement action brought under a contract claim did not garner federal jurisdiction.¹⁵⁴ The *Ausherman* case arose during a period of Second Circuit indecision—after *T.B. Harms*, prior to *Schoenberg*, and long before *Bassett*. Although the Tenth Circuit had previously adopted the well pleaded complaint rule in *Ausherman*,¹⁵⁵ it cited growing support for the rule when explicitly adopting it in *Image*.¹⁵⁶ By highlighting other circuits’ consistent embrace of the well pleaded complaint rule, the Tenth Circuit took a noteworthy and admirable step in pursuit of uniformity.

The Tenth Circuit’s acknowledgment of other circuits’ adoption of the well pleaded complaint rule highlights the importance of having a universal standard for “arising under” federal jurisdiction. The Second Circuit has long been a source of federal circuit precedent in copyright

150. Cotropia, *supra* note 145, at 38.

151. See Schaffner, *supra* note 149, at 1193 (citing Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990)).

152. *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1051 n.10 (10th Cir. 2006) (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 350-51 (2d Cir. 2000)) (noting that the First, Fourth, Fifth, Ninth, and Eleventh Circuits had adopted the Second Circuit’s approach).

153. 643 F.2d 715, 718 (10th Cir. 1981).

154. *Ausherman*, 643 F.2d at 718.

155. *Id.*

156. *Image*, 459 F.3d at 1049.

law¹⁵⁷ and it is not surprising that other circuits have followed its lead. The judicial system is stronger when it operates with uniformity regarding a particular issue.

B. Inadequacies of the Essence Test

Adoption of the well pleaded complaint rule is especially appropriate in light of the inadequacies of the essence test. The essence test requires the court to consider the complaint and all the surrounding circumstances to resolve the jurisdictional question.¹⁵⁸ This forces the court to determine jurisdiction before it can assess the “essence” of the case. This is impractical and may undermine a claimant’s legitimate choice of jurisdiction.

Jurisdiction is normally determined at the outset of a case, long before formal argument of the issues before the court. Yet the essence test seeks to determine jurisdiction based on a full understanding of the issues and each party’s respective arguments. There is an inherent contradiction in achieving a jurisdictional determination early in the case based on inquiry into issues that cannot be understood at such an early stage.¹⁵⁹

Even if a court adequately determines the “essence” of a case at the outset, the essence test can deprive a plaintiff with legitimate copyright claims of a venue to pursue relief.¹⁶⁰ Under the essence test, a plaintiff bringing suit for relief under the Copyright Act can be denied access to the federal courts if the district court determines that the copyright claims are incidental to a contract dispute.¹⁶¹ The injustice of such a denial is that this plaintiff is left to plead his case in state court and is denied the benefit of copyright remedies.

C. Addressing Arguments Against the Well Pleased Complaint Rule

The Second Circuit’s long period of indecision on the standard for determining when suits “arise under” the Copyright Act testifies to the volatility of the issue. Although many circuits have adopted the well pleaded complaint rule,¹⁶² there are still arguments against its implementation. Addressing three of these grievances illuminates a justified preference for the well pleaded complaint rule and an opportunity to improve its application.

Policy implications fuel some of the arguments against the well pleaded complaint rule.¹⁶³ One criticism is that failing to consider fed-

157. See Mark R. Kravitz, *Developments in the Second Circuit: 1997-1998*, 18 QUINNIPIAC L. REV. 809, 848-49 (1999).

158. McCarthy, *supra* note 22, at 180.

159. Bassett, 204 F.3d at 354.

160. *Id.* at 352.

161. *Id.* at 352-53.

162. *Image*, 459 F.3d at 1051 n.10.

163. Cotropia, *supra* note 145, at 37.

eral law counterclaims as a basis for jurisdiction may frustrate the interests of the counterclaiming party. Yet allowing a counterclaim to establish federal jurisdiction inherently frustrates a plaintiff pursuing state court jurisdiction. In either circumstance, one party's jurisdictional preference will be thwarted.

Consider a plaintiff pursuing a state breach of contract claim and a defendant with a federal copyright counterclaim. In the absence of the well pleaded complaint rule the counterclaimant may remove the case to federal court over the objections of the plaintiff who originally filed the case in state court. Abiding by the mantra that the plaintiff is master of his complaint,¹⁶⁴ the well pleaded complaint rule rightly supports the plaintiff's interest in maintaining jurisdiction in the forum in which he brought his complaint. Although application of the rule may fail to satisfy the counterclaiming defendant, the plaintiff is master of his complaint and deserves to have his state claim adjudicated.

In *Bassett*, the Second Circuit addressed another criticism of the well pleaded complaint rule: by allowing any plaintiff to gain federal jurisdiction by raising a federal copyright claim, the federal courts will be flooded by cases that are truly contract disputes.¹⁶⁵ The court dismissed this potentiality with historical fact.¹⁶⁶ During the twenty-eight years between *T.B. Harms* and *Schoenberg*, there was no evidence of the well pleaded complaint rule resulting in an overwhelming increase of Second Circuit copyright suits where the only disputes were over contract or ownership.¹⁶⁷ This information refutes the fear that the well pleaded complaint rule will result in an unmanageable increase of questionable copyright cases. The *Bassett* court maintained that the well pleaded complaint rule should be the standard by which all federal circuits determine copyright jurisdiction.¹⁶⁸

Another grievance with the well pleaded complaint rule is that it will frustrate the legitimate interests of the parties.¹⁶⁹ This argument maintains that a plaintiff can use the well pleaded complaint rule to trap a federal copyright counterclaim in state court.¹⁷⁰ This plaintiff could file a potentially federal case in state court to prevent a defendant from pleading in federal court.¹⁷¹ This is a genuinely unfortunate possibility. A defendant with a valid federal counterclaim could be denied a federal forum and federal copyright remedies.

164. *Kohler Die & Specialty Co.*, 228 U.S. at 25.

165. *Bassett*, 204 F.3d at 351.

166. *Id.*

167. *Id.*

168. *Id.* at 352-53.

169. *Cotropia*, *supra* note 145, at 37.

170. *Id.* at 47.

171. *Id.*

Yet failing to implement the well pleaded complaint rule could have similarly unjust ramifications. A plaintiff filing a state law claim in state court could be frustrated by a defendant whose federal counterclaim removes the case to federal court. This potentiality is equally unfortunate. The well pleaded complaint rule allows for the possibility that an unscrupulous party could game the system for an unfair advantage. This possibility is a regrettable consequence of many bright-line rules. However, the tradition, uniformity, and predictability of the well pleaded complaint rule make it the better option. An exception to the well pleaded complaint rule offers relief in those cases where a state court claim legitimately deserves federal jurisdiction.

D. The Complete Preemption Exception to the Well Pleased Complaint Rule

While the well pleaded complaint rule is the best path for determining jurisdiction in contract and copyright cases, there are circumstances that may unjustly prevent a party from appearing in federal court.¹⁷² The doctrine of complete preemption addresses many of these circumstances and should function as a valuable doctrinal tool in resolving jurisdictional disputes in the copyright context. The combination of the well pleaded complaint rule and the complete preemption doctrine offers a solution to determining “arising under” jurisdiction for copyright.

The preemption doctrine embodies the basic notion that a federal law can supersede or supplant a state law or regulation when the two conflict.¹⁷³ Preemption generally applies to matters that are so significantly national in character that the federal law preempts the state law.¹⁷⁴ Complete preemption is a relatively new doctrine that has been held to operate when a federal statute’s preemptive force is so overwhelming that it converts an ordinary state law complaint into a federal complaint for the purposes of the well pleaded complaint rule.¹⁷⁵

Complete preemption applies when federal statutory language demonstrates clear congressional intent that claims not only be preempted by federal law but also that they be removable.¹⁷⁶ As noted above, the federal Copyright Act grants exclusive federal jurisdiction for all copyright-related issues.¹⁷⁷ Congress directed that the universe of copyright be

172. As noted above, under the well pleaded complaint rule a legitimate copyright case may be stuck in state court because of the way the complaint is drafted by the plaintiff.

173. BLACK’S LAW DICTIONARY 1216 (8th ed. 2004).

174. Amy J. Everhart, *Ritchie v. Williams and the Complete Preemption Doctrine in Copyright: The New Federal/State Debate*, 42 TENN. BAR JOURNAL 18, 18 (2006).

175. BLACK’S LAW DICTIONARY 303 (8th ed. 2004).

176. *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 553 (6th Cir. 2005) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66-67 (1987)).

177. See 17 U.S.C.A. § 301(a) (West 2007). Specifically, § 301(a) identifies all rights within the general scope of copyright as exclusively federal. *Id.*

restricted to the federal arena.¹⁷⁸ This provides the basis for applying complete preemption to copyright.

Courts have applied the complete preemption doctrine in copyright cases by removing cases to federal court that would otherwise, under the well pleaded complaint rule, remain in state court.¹⁷⁹ In *Ritchie v. Williams*,¹⁸⁰ musical artist Robert Ritchie (aka Kid Rock) filed a federal trademark infringement action against promoter Alvin Williams.¹⁸¹ Less than two months later, Ritchie's former record company (for which Williams served as Vice President) brought suit in Michigan State Court alleging various state law claims.¹⁸² The state action included claims for breach of contract, unjust enrichment, misrepresentation, conversion and injunctive relief.¹⁸³ Williams claimed that he and Ritchie entered into a contract which granted Williams publication, performance, and distribution rights to songs written by Ritchie.¹⁸⁴ Ritchie subsequently cancelled the agreement, going on to fame and fortune.¹⁸⁵

Ritchie sought to remove the state action to federal court and the federal court held that Williams' claims were "clearly based in copyright."¹⁸⁶ Many of the state court claims were covered by § 106 of the Copyright Act: the rights to reproduce, distribute and perform the copyrighted work.¹⁸⁷ The well pleaded complaint rule would have mandated state court jurisdiction for these claims because Williams' original claims prayed for state court remedies for violations of state laws. The federal court used the complete preemption doctrine to recharacterize the state court claims as copyright claims and grant federal jurisdiction.¹⁸⁸

As exemplified in *Ritchie v. Williams*, the complete preemption doctrine is a practical exception to the well pleaded complaint rule.¹⁸⁹ It is especially applicable in copyright law where rights are assigned and licensed in contracts. While the cause of action may be a state claim for breach of contract, misrepresentation, or unjust enrichment, complete preemption allows a court to examine the complaint and determine whether it implicates significant federal interests.

178. *Id.*

179. *Ritchie*, 395 F.3d at 285; *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 301 (2d Cir. 2004); *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 227 (4th Cir. 1993).

180. 395 F.3d 283 (6th Cir. 2005).

181. *Ritchie*, 395 F.3d at 287.

182. *Id.* at 287 n.2.

183. Order Granting Plaintiffs/Counter-Defendants' Motion for Summary Judgment and Denying Defendants/Counter-Plaintiffs' Motion for Summary Judgment at 20, *Ritchie v. Williams*, No. 01-71712 (E.D. Mich. Feb. 3, 2003) [hereinafter Order Granting Summary Judgment].

184. *Ritchie*, 395 F.3d at 287.

185. *Id.*

186. Order Granting Summary Judgment, *supra* note 183, at 19.

187. 17 U.S.C.A. § 106 (West 2007).

188. *Ritchie*, 395 F.3d at 287.

189. Everhart, *supra* note 174, at 20.

Ritchie v. Williams is an example of a case where copyright claims were masked in state court causes of action perhaps to avoid federal jurisdiction. Williams claimed that Ritchie granted Williams the rights to Ritchie's music in an agreement that was to expire in 1993.¹⁹⁰ Williams brought his state court claims in 2001 but the statute of limitations on a copyright claim is only three years and therefore would have expired in 1996. Williams may have brought his claims in state court because his federal claims would have been barred under to the statute of limitations.

Under the well pleaded complaint rule, this case would have been stuck in state court because the face of the complaint did not pray for relief under the Copyright Act (or any other federal law). As proponents of the essence test would note, this application of the well pleaded complaint rule would have prevented Ritchie from having his legitimate copyright issues resolved in federal court. The complete preemption doctrine solves this shortcoming of the well pleaded complaint rule by allowing removal to federal court.

There are two requirements that must be satisfied for a state court claim to be preempted under the Copyright Act: (1) the work must fall within the scope of copyright; and (2) the state law rights must be equivalent to rights granted federal copyright protection.¹⁹¹ In *Ritchie*, the disputed works were musical works which garner copyright protection under § 102(a)(2) of the Copyright Act.¹⁹² Williams' state claims alleged that Ritchie was unjustly enriched by these works and that Ritchie breached his contract assigning Williams the rights to these works.¹⁹³ Federal copyright law protects these same rights that Ritchie was accused of infringing.¹⁹⁴ In this example, complete preemption justly removed *Ritchie* from state to federal court.

The complete preemption exception to the well pleaded complaint rule solves a problem in classifying "arising under" jurisdiction for copyright claims. While the well pleaded complaint rule is generally superior in determining copyright jurisdiction, its vulnerability is the risk that a valid copyright claim could be characterized in state law terms to avoid federal jurisdiction. Application of the complete preemption doctrine addresses this shortcoming by providing an avenue for state claims to be heard in federal court without depriving plaintiffs and the courts of the benefits of the well pleaded complaint rule. Courts should employ the well pleaded complaint rule in conjunction with the complete preemption doctrine to keep copyright claims out of state court and ensure that parties with valid copyright claims will be heard in federal court.

190. *Ritchie*, 395 F.3d at 287.

191. *Stromback v. New Line Cinema*, 384 F.3d 283, 300 (6th Cir. 2004).

192. 17 U.S.C.A. § 102(a)(2) (West 2007) ("Copyright protection subsists, in . . . musical works.").

193. *Ritchie*, 395 F.3d at 287.

194. See 17 U.S.C.A. § 106.

CONCLUSION

The importance of federal uniformity cannot be overstated. Until the Supreme Court decides an issue, the circuit courts of appeals are entrusted with determining the best path in a disputed area of law. The Tenth Circuit should be commended for taking the opportunity to adopt the well pleaded complaint rule and promoting consistency in federal "arising under" copyright jurisdiction. While all circuits have not embraced the test, *Image* places the Tenth Circuit in the clear majority.¹⁹⁵

The well pleaded complaint rule has limitations that require attention. It fails to ensure that all legitimate copyright claims arrive in federal court. Yet the primary alternative (the essence test) is a worse option. Arguments against the well pleaded complaint rule leave courts without a standard that allows for equal treatment of all parties. The equitable determination of federal or state jurisdiction "poses among the knottiest procedural problems in copyright jurisprudence."¹⁹⁶ The present lack of alternatives suggests the need for a fresh proposal.

Both the well pleaded complaint rule and the complete preemption doctrine are established principles of modern jurisprudence. A significant shortcoming of the well pleaded complaint rule is the possibility that a defendant with legitimate copyright claims will be denied federal jurisdiction by a plaintiff pleading breach of contract claims in state court. Application of complete preemption addresses this shortcoming and acts as a valuable exception to the well pleaded complaint rule. Implementation of this amendment to the rule should be applied across the federal circuits to provide uniform jurisdictional determinations

The Tenth Circuit is right to adopt the well pleaded complaint rule for copyright and the Second Circuit has put a concerted effort into establishing a bright line rule. As the ongoing development of technology continues to make demands upon copyright law, the jurisprudence must adapt and craft rules that meet the demands of the system.

David Ratner*

195. The *Image* court referenced *Bassett's* assertion that the First, Fourth, Fifth, Ninth, and Eleventh Circuits have all adopted the Second Circuit's angle on this jurisdictional determination. *Image*, 459 F.3d at 1051 n.9 (citing *Bassett*, 204 F.3d at 350-51). Other cases adopting the well pleaded complaint rule include: *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974); *Spearman v. Exxon Coal USA*, 16 F.3d 722 (7th Cir. 1994) (dissent); *Scandinavian Satellite Sys. v. Prime TV Ltd.*, 291 F.3d 839, 844 (D.C. Cir. 2002).

196. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.01[A] (2003).

* J.D. Candidate, May 2008, University of Denver Sturm College of Law. I would like to thank Professor Viva Moffat for her guidance and inspiration, Marilyn Ratner for being the consummate life-long editor, Michael Ratner for always knowing that law school was in my future, and Lacy Kamm for her constant love and support.

AID FOR WOMEN V. FOULSTON:
THE CREATION OF A MINOR'S RIGHT TO PRIVACY AND A
NEW PRELIMINARY INJUNCTION STANDARD

INTRODUCTION

Forty-six percent of teens aged fifteen to nineteen have had sex at least once.¹ This startling statistic raises the question of how the state, which has an interest in protecting its youth, should deal with underage sex. Some people argue for promoting abstinence, others argue for providing contraceptives; some argue for education in schools, others for parental education. There are a variety of ways to deal with the problem, and some are more controversial than others. Kansas Attorney General Phill Kline found one of the most controversial ways to protect teenagers from the harms of sex, implemented it in an attorney general opinion, and faced the inevitable public critique and lawsuits over his choice of protection.

In 2003, Attorney General Kline issued an advisory opinion requiring doctors, teachers, police officers, counselors, and other similarly situated professionals to report all instances of consensual underage sex to the state's social service department.² Not surprisingly, those required to report brought suit seeking to enjoin the enforcement of his opinion. In *Aid for Women v. Foulston*,³ the Tenth Circuit Court of Appeals was presented with the constitutionality of Attorney General Kline's advisory opinion.

This note will discuss the case in its entirety, various issues surrounding it, the precedent set by the Tenth Circuit Court of Appeals, and the motivation behind Attorney General Kline's interpretation. Part I will address the factual background of *Aid for Women* and the main legal issues involved. Part II will discuss *Aid for Women*, including the trial court decision and the remanded case. Part III will examine the precedent set by *Aid for Women*, arguing that the court was correct in recognizing a minor's right to privacy for the first time, but improperly applied

1. JOYCE C. ABMA ET AL., TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2002 1 (Nat'l Ctr. for Health Statistics, Vital and Health Statistics, Series 23, No. 24, 2004), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_024.pdf.

2. See 2003 Kan. AG LEXIS 22, at *3, 18-19 (2003). Attorney General Kline refers to consensual sex between two underage partners as "the rape of a child." Press Release, Office of Kansas Attorney General Phill Kline, Statement of Attorney General Kline Concerning Federal District Court Ruling in Underage Reporting Case (Apr. 18, 2006), http://www.kansas.gov/ksag/Press/2006/0418_underage_reporting.htm. He is referring to the fact that anytime one person under the age of sixteen has sex in Kansas it is statutory rape. If two people under sixteen have sex this is statutory rape as well.

3. 441 F.3d 1101 (10th Cir. 2006).

and limited the preliminary injunction standard by assuming all government action taken pursuant to a statutory scheme is necessarily in the public interest. Part IV attempts to explain the motivation behind the Kline opinion and the repeated connection academia makes between this case and the ongoing abortion debate. Part IV further explores the cost of the lawsuit and why Phill Kline appealed the grant of a preliminary injunction, but failed to appeal the permanent injunction.

I. BACKGROUND

A. K.S.A. § 38-1522—*The Reporting Statute*

Kansas law requires certain professionals⁴ who have “reason to suspect that a child has been injured as a result of . . . sexual abuse” to “report the matter promptly” to the Kansas Department of Social and Rehabilitation Services (the “SRS”).⁵

“Sexual abuse,” as used in the reporting statute, is defined as “any act committed with a child which is described in article 35, chapter 21 of the Kansas Statutes Annotated”⁶ Article 35 criminalizes a variety of sexual activity, including voluntary sexual activity involving minors under sixteen.⁷ Therefore, a professional subject to the reporting statute must notify the SRS when there is evidence of injury resulting from sex-

4. Professionals required to report include:

Persons licensed to practice the healing arts or dentistry; persons licensed to practice optometry; . . . licensed psychologists; . . . licensed clinical psychotherapists; licensed professional or practical nurses examining, attending or treating a child under the age of 18; teachers, school administrators or other employees of a school which the child is attending; . . . licensed professional counselors; licensed clinical professional counselors; registered alcohol and drug abuse counselors; . . . licensed social workers; firefighters; emergency medical services personnel; . . . juvenile intake and assessment workers; and law enforcement officers.

KAN. STAT. ANN. § 38-1522(a) (2006).

5. *Id.*

6. § 38-1502(c).

7. § 21-3502(a)(2). For example, article 35 criminalizes:

[E]ngaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age: (1) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or (2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

§ 21-3503(a); and:

engaging in voluntary: (1) Sexual intercourse; (2) sodomy; or (3) lewd fondling or touching with a child who is 14 years of age or older but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties involved and are members of the opposite sex.

§ 21-3522(a). It is important to note that this statute makes voluntary sexual activity between minors under sixteen illegal in Kansas. *Id.* Where “consensual” is used in this paper and in the statutes, read “voluntary,” as minors under sixteen are not legally capable of consenting, as regards sex or contracts.

ual conduct involving minors under sixteen, voluntary or not.⁸ Failure to make such a report is a misdemeanor.⁹

B. Reporting and Investigation Policies of the SRS

Reports of sexual abuse are usually made to the SRS.¹⁰ When a report of alleged abuse is made, an intake screener collects information from the reporter about the minor, the alleged perpetrator, and the minor's caretaker.¹¹ The screener then determines whether "the department has the statutory authority to proceed and whether the interests of the child require further action to be taken."¹² Where the report does not meet the statutory definitions or "indicates lifestyle issues which do not directly harm children,"¹³ "the department may determine the case will not be accepted for investigation and assessment (the report is 'screened out')."¹⁴ There are several situations in which the SRS screens out reports of abuse.¹⁵ Among the listed situations is "[m]utual sexual exploration of age-mates (no force, power differential, or incest issues)."¹⁶ Cathy Hubbard, the SRS Program Administrator for the Protection Unit of Child and Family Services, testified that "one reason such cases are not investigated further is because it is impossible to identify which child is the victim and which is the perpetrator."¹⁷

The information provided in any screened out report is entered into a database (Family and Child Tracking System) which allows the SRS to check for any prior reports made or any other evidence that would indicate a need for further inquiry.¹⁸ No information is provided to the police department and no SRS services are provided.¹⁹ At trial, the SRS regional director Jean Hogan testified that she was unaware of any criminal proceedings brought as a result of a screened out report.²⁰ The SRS's policy of screening out voluntary underage sexual activity is long-

8. See *Aid for Women v. Foulston*, 441 F.3d 1101, 1106-07 (10th Cir. 2006); see also 2003 Kan. AG LEXIS 22, at *3 (2003).

9. § 38-1522(f).

10. § 38-1522(c). The Reporting Statute provides for different procedures of reporting when the office is closed or the abuse occurred in an SRS institution, but generally the report is made to the SRS. § 38-1522 (c), (d).

11. *Aid for Women*, 427 F. Supp. 2d at 1098.

12. KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, CHILDREN AND FAMILY SERVICES POLICY AND PROCEDURE MANUAL §§ 1300, 1360 (July 2006) (on file with author) [hereinafter SRS MANUAL].

13. *Id.* §§ 1360, 1361.

14. *Id.* § 1360.

15. *Id.* § 1361.

16. *Id.* § 1361(b). The SRS testified that they consider "age-mates" to be persons within three years of each other. *Aid for Women*, 427 F. Supp. 2d at 1098 n.4.

17. *Aid for Women*, 427 F. Supp. 2d at 1099.

18. SRS MANUAL, *supra* note 12, § 1370.

19. *Aid for Women*, 427 F. Supp. 2d at 1098.

20. *Id.*

standing, and there is no evidence that the legislature ever intended to change that policy.²¹

C. The Function of the Attorney General and Attorney General Opinions

The state attorney general is a member of the executive branch and acts as the legal representative for the state.²² As such, he or she is responsible for the prosecution and defense of all actions, civil and criminal, in which the state is a party.²³ In addition, the attorney general is required to answer questions put to him or her by all county attorneys or any member of the legislative or executive branch.²⁴ Such opinions are not binding on the judiciary, although they are given special consideration as persuasive authority.²⁵ Nonetheless, "the opinions of the attorney general have in no sense the effect of judicial utterances."²⁶

In Kansas specifically, "[t]he Attorney General . . . is not only allowed to, but also required to render an opinion on his interpretation of the law"²⁷ However, final interpretation of the law is an exclusive judicial function that cannot be infringed upon by the executive or legislative branches.²⁸ Thus, an attorney general opinion in Kansas "cannot effectively amend legislation by reinterpreting its language through an 'advisory' opinion."²⁹ Furthermore, Kansas attorney general opinions are not binding on district or county attorneys in Kansas.³⁰

As a member of the executive branch, the attorney general is charged with the task of enforcing the laws as they are written, refraining from interpreting the law in any significant way.³¹ Of course, with every act of enforcement comes an act of interpretation, as the attorney general must interpret and understand the laws he or she is implementing. However, the attorney general, in enforcing the laws, is bound by the interpretations set forth by the courts.³² Thus, any enforcement actions must be consistent with the common law of the jurisdiction in question.³³ Attorney General Kline is bound by the common law of Kansas, the Supreme Court, and the Tenth Circuit Court of Appeals in rendering opinions and enforcing existing laws like the Kansas Reporting Statute.

21. *Id.* at 1099.

22. *State v. Finch*, 280 P. 910, 911 (Kan. 1929).

23. KAN. STAT. ANN. § 75-702 (2006).

24. *Id.* § 75-704.

25. 7 AM. JUR. 2D *Attorney General* § 11 (2006).

26. *Id.*

27. *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1103 (D. Kan. 2006).

28. *Aid for Women*, 427 F. Supp. 2d at 1103-04.

29. *Id.*

30. *Id.* at 1106.

31. *See id.* at 1103-04.

32. *See id.*

33. *See id.*

D. Conflicting Attorney General Advisory Opinions

The reporting statute has been subject to two contradictory attorney general opinions since its enactment in 1982.³⁴ In 1992 Attorney General Robert Stephan opined that the reporting statute “does not require reporting of all suspected child abuse; it requires reporting in situations where there is ‘reason to suspect the child has been injured’ as a result of abuse.”³⁵ Stephan recognized that sexual abuse included voluntary sex between age-mates under sixteen.³⁶ However, he construed the statute strictly against the state and opined that the statute only required reporting “where there is ‘reason to suspect the child has been *injured*’ as a result of abuse.”³⁷ Stephan examined the legislative history of the statute, which indicated that the legislature took affirmative steps to add “injuries resulting from” to the statute’s language, and determined that the legislature intended reporting only where injury was present.³⁸ He left the definition of injury broad, noting that emotional injury would suffice, but refused to find mere evidence of consensual sexual relations injurious as a matter of law.³⁹

The reporting statute was interpreted again in 2003 when Senator Mark Gilstrap from the 5th District of Kansas asked Attorney General Phill Kline “under what circumstances does an abortion doctor need to report rape and or sexual abuse on a minor?”⁴⁰ In Phill Kline’s response, he opined that all sex between minors is injurious as a matter of law, and therefore any evidence of sexual abuse, including voluntary sexual activity between age-mates under sixteen, must be reported to the SRS.⁴¹

Attorney General Kline’s conclusion that “the act of rape, whether forcible or ‘statutory,’ is an act that is inherently injurious and harmful” was “limited to the specific offenses involving sexual intercourse with a female under the age of 16.”⁴² His opinion was based largely on cases “from at least 42 states” that “have unanimously held that sexual abuse of a child is so inherently injurious to the victim that harm, or intent to

34. KAN. STAT. ANN. § 38-1522.

35. 1992 Kan. AG LEXIS 48, at *3-4 (1992).

36. *See id.* at *3.

37. *Id.* at *3-4 (emphasis added).

38. *Id.* at *8-9. Attorney General Stephan had some difficulty in determining the meaning of injury as there was no definition in the statute, nor in the legislative history. *Id.*

39. *Id.* at *9-10. Attorney General Stephan also noted that case law did not consider pregnancy, the chief indicator of sexual activity, an injury but rather a natural condition. *Id.* (citing *Carter v. Howard*, 86 P.2d 451, 455 (Or. 1939)). They further found this determination consistent with Kansas law, which provides no cause of action for the birth of a normal, healthy child. *Id.* at *10 (citing *Byrd v. Wesley Med. Ctr.*, 699 P.2d 459 (Kan. 1985); *Johnson v. Elkins*, 736 P.2d 935, 939 (Kan. 1987)).

40. Letter from Mark S. Gilstrap, Kansas State Senator, 5th District, to The Honorable Phill Kline, State of Kansas Attorney General (Jan. 13, 2003) (on file with author). Senator Gilstrap asked for the opinion at the request of one of his constituents. E-Mail from Mark S. Gilstrap, Kansas State Senator, 5th District, to author (Sept. 28, 2006) (on file with author).

41. 2003 Kan. AG LEXIS 22, at *2-3 (2003).

42. *Id.* at *5-6, *8 n.15.

harm, is inferred as a matter of law.”⁴³ In addition, Kline relied upon cases tending to show that statutory rape laws are for the “protect[ion] [of] juveniles from improvident acts.”⁴⁴ From this general premise, Attorney General Kline inferred that consensual sex between minors is “injurious as a matter of law.”⁴⁵

Attorney General Kline noted the broad consequences of his opinion.⁴⁶ Aside from mandatory reporting requirements for abortion doctors faced with a pregnant minor, other situations that would trigger a mandated reporter’s obligation include any time there is evidence of sexual activity.⁴⁷ Thus, included professionals must report to the SRS when a minor seeks medical attention for a sexually transmitted disease, prenatal care for a pregnant minor, and a teenage girl who seeks birth control and discloses that she has already been sexually active.⁴⁸

Attorney General Kline ended his opinion with a reminder that the function of the judiciary is to interpret laws as they are written and intended, and not to legislate from the bench.⁴⁹

II. *AID FOR WOMEN V. FOULSTON*⁵⁰

A. *Initial Trial Court Action*

About four months after Attorney General Kline issued his opinion, a group of affected medical professionals brought suit in the United

43. *Id.* at *11 (citing *Mfrs. & Merchs. Mut. Ins. Co. v. Harvey*, 498 S.E.2d 222, 226 n.1 (S.C. 1998) and cases cited therein). *Harvey* involved whether a grandparent’s insurance policy covered them for the molestation of their five grandchildren. The court held that intent to harm the child could be inferred from the act, and therefore the incidents were not “accidents” as the defendant’s claimed, and therefore were not covered. *Harvey*, 498 S.E.2d at 226-27. The “cases cited therein” all dealt with a similar problem, that is, whether insurance carriers were required to pay for an adult’s sexual abuse of minors. 2003 Kan. AG LEXIS 22, *11-13 (2003). The inclusion of “harm, or intent to harm” is no mistake. *Id.* at *11-12 (emphasis added). None of the cited cases inferred harm, but rather intent to harm. Thus, attributing truth to the latter part of the disjunctive clause is the only correct reading. It is a matter of common sense that harm and intent to harm are separate concepts—mere intent to harm cannot, without further action, actually harm a person.

44. 2003 Kan. AG LEXIS 22, at *18-19 (2003) (citing *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981); *State ex. rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1279 (1993)). The citations provided for these cases are inaccurate on many levels (one case simply does not exist, another cites to forty plus pages to support an integral proposition that can only be supported by a very strained reading of the case law). Thus, assessing the validity of the Kline opinion’s use of precedent is difficult at best.

45. 2003 Kan. AG LEXIS 22, at *18 (2003).

46. *Id.* at *19. He also noted that the opinion spoke to concerns not raised by Senator Gilstrap’s question, which was specific to abortion doctors. Letter from Mark S. Gilstrap, Kan. State Senator, 5th Dist., to The Honorable Phill Kline, State of Kansas Attorney Gen. (Jan. 13, 2003) (on file with author).

47. 2003 Kan. AG LEXIS 22, at *19 (2003). Mandated reporters include anyone listed in the statute.

48. *Id.* Other instances of evidence of sexual activity which mandate reporting undoubtedly exist, such as any time a student seeks a teacher’s or counselor’s advice on sexual activity already performed, but these are the three instances Attorney General Kline specifically noted in his opinion. *Id.*

49. *Id.* at *19-20.

50. 441 F.3d 1101 (10th Cir. 2006).

States District Court for the District of Kansas seeking a preliminary injunction and declaratory relief against enforcement of the Kline interpretation.⁵¹

The plaintiffs sought relief on three grounds: 1) the reporting statute as interpreted is unconstitutional because it fails to give plaintiffs fair notice of when reporting is required; 2) the reporting statute as interpreted inhibits the minor's ability to obtain contraception and prevents them from obtaining abortions confidentially; and 3) the reporting statute as interpreted is unconstitutional because it violates a minor's right to informational privacy without serving a "legitimate, compelling or important state interest."⁵² The trial court ultimately granted the preliminary injunction.

B. Tenth Circuit Review

The Kansas Attorney General's office appealed the grant of a preliminary injunction to the Tenth Circuit Court of Appeals.⁵³ The Tenth Circuit found that the plaintiffs had standing to assert both their own and their minor patients' rights, but held that the issuance of a preliminary injunction was an abuse of discretion and remanded for a trial on the merits.⁵⁴ The court held that the plaintiffs did not stand a "substantial likelihood of success on the merits" on the minor privacy claim, as minors do not have a reasonable expectation of privacy in their criminal sexual conduct.⁵⁵

Generally, in order to obtain a preliminary injunction,

a plaintiff must establish: (1) a substantial likelihood of success on the merits, (2) that the plaintiff will suffer irreparable injury if the preliminary injunction is denied, (3) that the threatened injury to the plaintiff outweighs the injury to the defendant(s) caused by the preliminary injunction, and (4) that an injunction is not adverse to the public interest.⁵⁶

However, in *Continental Oil Co. v. Frontier Refining Co.*,⁵⁷ the Tenth Circuit adopted the reasoning of the Second Circuit in holding that the "substantial likelihood of success requirement" for a preliminary injunction may be lowered to a "fair grounds for litigation" standard when the other three requirements for a preliminary injunction are met.⁵⁸ The Court qualified this reduced standard in *Heideman v. South Salt Lake*

51. *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273, 1275 (D. Kan. 2004).

52. *Aid for Women*, 327 F. Supp. 2d at 1280.

53. *Aid for Women*, 441 F.3d at 1106.

54. *Id.* at 1121.

55. *Id.* at 1118.

56. *Id.* at 1115 (citing *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001)).

57. 338 F.2d 780 (10th Cir. 1964).

58. *Continental Oil Co.*, 338 F.2d at 781-82.

*City*⁵⁹ in holding "where . . . a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should not be applied."⁶⁰

In *Aid for Women*, the Tenth Circuit assumed for the first time that "all governmental action taken pursuant to a statutory scheme is 'taken in the public interest.'"⁶¹ As such, the *Heideman* rule was inapplicable, and the heightened "substantial likelihood of success" standard was applied.

Starting with the first element, the court held that the plaintiffs had not met their burden of showing a "substantial likelihood of success on the merits" for two reasons.⁶² First, because voluntary sexual activity between age-mates is criminal in Kansas, the minor patients were effectively put "on notice" that their activities were not protected by the right to privacy.⁶³ Thus, "minors may not have any privacy rights in their concededly criminal sexual conduct."⁶⁴

The court found support for this holding in a line of Tenth Circuit cases holding that "a validly enacted law places citizens on notice that violations thereof do not fall within the realm of privacy. Criminal activity is . . . not protected by the right to privacy."⁶⁵ Both *Nilson v. Layton City*⁶⁶ and *Stidham v. Peace Officer Standards and Training*⁶⁷ involved plaintiffs who claimed that their privacy rights had been violated by disclosure of prior sexual misconduct.

In *Nilson*, a police officer disclosed information to a news reporter about Nilson's prior conviction for sexual abuse.⁶⁸ The plaintiff's claim was rejected, in part because "[l]aws proscribing sexual abuse place [the plaintiff] on notice that violations thereof do not fall within the constitutionally protected privacy realm."⁶⁹ In *Stidham*, a peace officer claimed that his employer violated his right to privacy by disclosing allegedly false accusations that he had raped a young woman.⁷⁰ While noting the sensitive nature of the information, the court concluded once again that

59. 348 F.3d 1182 (10th Cir. 2003).

60. *Heideman*, 348 F.3d at 1189 (quoting *Sweeney v. Bane*, 996 F.2d 1384, 1388 (2d Cir. 1993)) (internal quotation marks and citation omitted).

61. *Aid for Women*, 441 F.3d at 1115 n.15.

62. *Id.* at 1117.

63. *Id.* at 1118.

64. *Id.* at 1117.

65. *Id.* (quoting *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995)); see also *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) ("Validly enacted drug laws put citizens on notice that this realm is not a private one. Accurate information concerning such unlawful activity is not encompassed by any right of confidentiality . . .").

66. *Nilson*, 45 F.3d at 370.

67. *Stidham*, 265 F.3d at 1149.

68. 45 F.3d at 370-71.

69. *Id.* at 372.

70. 265 F.3d at 1149.

“a validly enacted law places citizens on notice that violations thereof do not fall into the realm of privacy.”⁷¹ Since consensual sex between minors is illegal in Kansas, the court concluded that the minors did not enjoy a privacy right in their criminal sexual conduct.⁷²

Second, the court concluded that even if the reasoning from *Nilson* and *Stidham* did not apply, the plaintiffs had not “‘clearly and unequivocally’ shown that the balance between their privacy rights and the government’s interests in requiring reporting is substantially likely to weigh in their favor.”⁷³

Typically, if a plaintiff can demonstrate a legitimate expectation of privacy, they must still show that the “balance between their privacy interests and the government’s interests in requiring [disclosure] is substantially likely to weigh in their favor,” and that there are less intrusive means of achieving the desired end.⁷⁴ However, the court found that when dealing with the privacy rights of minors, the test to apply is whether disclosure of confidential information “serves any significant state interest . . . that is not present in the case of an adult.”⁷⁵ Thus, a balancing test must be performed between the state’s interest and the minor’s countervailing privacy rights.⁷⁶

The court found that the balance weighed in the state’s favor.⁷⁷ First, the state has a compelling interest in enforcing its criminal laws.⁷⁸ Since sexual activity between minors under sixteen is illegal in Kansas, the state has a significant interest in obtaining information that will lead to the arrest of those in violation of the law. Second, the state has a strong *parens patriae* interest in protecting minors.⁷⁹ By providing the state with information regarding sexual abuse, the state is better equipped to advance the best interests of minors.⁸⁰ Third, the state has a significant interests in promoting the health of its citizens, and even more so when dealing with minors.⁸¹ “Reporting instances of illegal sexual abuse

71. *Id.* at 1155 (quoting *Nilson*, 45 F.3d at 372). Justice Herrera’s dissenting opinion took issue with the reliance on these cases. He found them factually distinguishable as both *Nilson* and *Stidham* involved “rights of privacy information regarding the plaintiffs’ own criminal conduct. In contrast, the reporting statute at issue here requires an infringement of the privacy rights of victims, and not just perpetrators, of criminal conduct.” *Aid for Women v. Foulston*, 441 F.3d 1101, 1125 (10th Cir. 2006) (Herrera, J., dissenting). Justice Herrera’s dissent was followed, in part, by the Indiana Court of Appeals in *Planned Parenthood of Indiana v. Carter*, 854 N.E.2d 853, 877 (Ind. Ct. App. 2006).

72. *See Aid for Women*, 441 F.3d at 1118.

73. *Id.* at 1118-19.

74. *Id.*

75. *Id.* at 1119 (plurality opinion) (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693 (1977)).

76. *Aid for Women*, 441 F.3d at 1119.

77. *See id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

enables the state of Kansas to protect the health of its citizens, especially children.”⁸²

Finally, two factors serve to diminish the privacy rights of the plaintiffs’ minor patients.⁸³ First, the underlying sexual conduct is criminal.⁸⁴ Even assuming that the minors have a legitimate expectation that their “concededly criminal” conduct will not be revealed, the court found this diminished the minor’s privacy interest in such activity.⁸⁵ Second, “the fact that the privacy rights asserted are . . . [those] of minors diminishes the strength of those rights somewhat.”⁸⁶ Since the state has broader authority to regulate the conduct of minors than of adults, their privacy rights in personal sexual activity are not as strong as adults, thus diminishing their privacy interests.⁸⁷

The court was careful to state that it was not deciding exactly how the balance would come out, rather noting that these factors merely reduced the likelihood of success for the plaintiffs, such that they could not show a “substantial likelihood of success on the merits.”⁸⁸ Accordingly, the court held that the preliminary injunction was granted in error.⁸⁹

The court ended its discussion by criticizing the trial court for failing to address the remaining elements of a preliminary injunction.⁹⁰ First, the district court did not address “whether there would be irreparable injury in the absence of this preliminary injunction.”⁹¹ Second, in regard to the third factor (whether the threatened injury to the plaintiff outweighs the injury to the defendants caused by the preliminary injunction), “the district court did not even identify any possible harm to the Defendants from the injunction.”⁹² As to the plaintiffs, the court merely stated that even a limited disclosure of such personal information could have “large implications” for the well-being of minors.⁹³ “[L]arge implications’ is not equivalent to harm, and such vague language does not indicate the sort of analysis properly involved in evaluating this factor.”⁹⁴ Finally, the district court failed to engage in an explicit analysis of whether the preliminary injunction would be adverse to the public inter-

82. *Id.* at 1120.

83. *Id.*

84. *Id.*

85. *See id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* at 1120-21. The remaining elements are: (2) the plaintiff will suffer irreparable injury if the preliminary injunction is denied, (3) the threatened injury to the plaintiff outweighs the injury to the defendant(s) caused by the preliminary injunction, and (4) the injunction is not adverse to the public interest. *Dominion Video Satellite, Inc.*, 269 F.3d at 1154 (citing *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1065-66 (10th Cir. 2001)).

91. *Aid for Women*, 441 F.3d at 1120.

92. *Id.* at 1121.

93. *Id.* (quoting *Aid for Women*, 327 F. Supp. 2d at 1288).

94. *Aid for Women*, 441 F.3d at 1121.

est.⁹⁵ Rather, it simply stated that “the parties operated under the 1992 advisory opinion for a substantial period of time without discernable problems.”⁹⁶ Thus, the district court abused its discretion in failing to analyze the remaining three factors to the liking of the Tenth Circuit Court of Appeals.⁹⁷

The Tenth Circuit agreed with the district court that the Plaintiffs had standing to litigate their claims and raise the privacy interests of their minor patients, but denied the preliminary injunction and remanded the case for further proceedings consistent with their opinion.⁹⁸

C. Remanded Case

On remand, the United States District Court for the District of Kansas granted permanent injunctive and declaratory relief for the plaintiffs, thus preventing the enforcement of Attorney General Kline’s interpretation of the reporting statute.⁹⁹

The court took a decidedly different approach to deciding the case this time, focusing heavily on the interpretation of the reporting statute itself and taking special care to cure the defects of the previous decision.¹⁰⁰

First, the court found the reporting statute “clear[ly] and unambiguous[ly]” required reporting only where there is evidence of injury as a result of sexual abuse.¹⁰¹ The court examined the statute by breaking it into two separate components.¹⁰² The statute recognizes “that a mandatory reporter must identify two things: 1) there is reason to suspect that the child has been injured; and 2) the injury resulted from sexual abuse.”¹⁰³ Under the Kline interpretation, mandatory reporters would only have to identify that sexual abuse had taken place, keeping in mind that consensual sex between age-mates under sixteen is “sexual abuse” in Kansas.¹⁰⁴ Under Attorney General Kline’s reading, the court opined, “the requirement of an ‘injury’ in the reporting statute is rendered meaningless.”¹⁰⁵

The court noted that the legislature, through the language of the statute and the intentional inclusion of “injury,” “acknowledged that not

95. *Id.*

96. *Id.* (quoting *Aid for Women*, 327 F. Supp. 2d at 1288).

97. *Aid for Women*, 441 F.3d at 1121.

98. *Id.*

99. *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1116 (D. Kan. 2006).

100. *Id.* at 1101, 1114-16.

101. *Id.* at 1101.

102. *Id.*

103. *Id.*

104. *See id.* at 1101-02.

105. *Id.* at 1102. The reporting statute states: “(a) When any of the following persons has reason to suspect that a child has been injured as a result of . . . sexual abuse, the person shall report the matter promptly [to the SRS].” KAN. STAT. ANN. § 38-1522(a) (2006).

all illegal sexual activity involving a minor necessarily results in 'injury.'"¹⁰⁶ Strictly adhering to the canons of statutory construction, the court held that mandatory reporting of sexual abuse of a minor is only required where accompanied by evidence of injury.¹⁰⁷

In addition to violating the plain language of the statute, the court found that Attorney General Kline's interpretation, "wrongly redefine[d] the common understanding of both state agencies [SRS] and mandatory reporters by denoting all sexual activity to be 'inherently injurious.'"¹⁰⁸ For these reasons, the court refused to accept Attorney General Kline's interpretation of the statute and declared that reporting was required only where there is evidence of injury as a result of sexual abuse.¹⁰⁹

III. ANALYSIS

A. *The Precedent*

The Tenth Circuit's decision had a minimal effect on the immediate parties since the trial court quickly granted a permanent injunction. The precedent set, however, is substantial. The court explicitly recognized a minor's right to informational privacy for the first time and altered a significant body of existing law regarding preliminary injunctions in the Tenth Circuit. This section will address these two issues, arguing that though the court was correct in extending privacy rights to minors, the preliminary injunction standard should not have been altered.

1. Minors' Right to Informational Privacy

The competing interests involved in granting minors a right to informational privacy both hold great importance, and neither can be easily dismissed. On the one hand, minors should be protected as much as possible from the evils of sexual abuse. On the other, we want to respect minors' right to keep personal information private, away from the scrutiny of the courts and government. Both interests have a long line of legal support, and balancing the interests is a difficult task.¹¹⁰

The Kansas district court's opinion on remand gives many reasons why denying minors a right to privacy under these circumstances would be injurious to their health and well being. The court aptly noted that by requiring disclosure to the government, minors will be dissuaded from

106. *Aid for Women*, 427 F. Supp. 2d at 1102.

107. *See id.* at 1103.

108. *Id.* at 1104.

109. *Id.* Since the reporting statute covers areas beyond sexual abuse, i.e. physical, mental or emotional abuse, this opinion should have the effect of requiring reporting only when there is evidence of injury, regardless of the injury's source. *See* KAN. STAT. ANN. § 38-1522.

110. *See* Miriam E. C. Bailey, Note, *The Alpha Subpoena Controversy: Kansas Fires First Shot in Nationwide Battle over Child Rape, Abortion and Prosecutorial Access to Medical Records*, 74 UMKC L. REV. 1021, 1032 (2006).

obtaining medical attention, such as prenatal care, contraceptives, and psychological services.¹¹¹

The court further noted that the “evidence supports a finding that mandatory reporting of all illegal underage sexual activity will harm those minors who are actual victims of ‘sexual abuse’ as defined by the SRS’s working definition.”¹¹² That is, by “overwhelming state agencies” with reports of every incident of sexual activity between minor age-mates, the true victims of sexual abuse will be lost in the files.¹¹³ Vital resources will be wasted on gathering reports that will be screened out in the end anyway.¹¹⁴

The most telling examples of the harms inherent in denying minors some degree of privacy came from the various experts testifying at trial. Oddly enough, experts on both sides of the lawsuit testified that minors might be dissuaded from seeking medical attention and advice if their private information were unprotected from government scrutiny.¹¹⁵

The decision of the Kansas district court exemplified the benefits of a minor’s limited right to informational privacy, and adequately accounted for the paramount nature of each competing interest. Limiting mandatory disclosure to those situations in which injury is suspected ensures that, where there is harm, a minor will be afforded the protection

111. *Aid for Women*, 427 F. Supp. 2d at 1107.

112. *Id.* at 1108.

113. *Id.* at 1109.

114. *See id.* One can imagine the immense number of calls the SRS would receive each day if the Kline interpretation was followed. Beyond the prevalence of sexual activity between minors, those opposed to the Kline interpretation might give him exactly what he wants, and take the slightest evidence of sexual activity as a chance to report, with a mind for overburdening the SRS to the point that they simply cannot function and legislative action is required. As a matter of fact, California faced this precise problem when the legislature amended the sexual abuse statute to include any act of intercourse involving a woman under the age of eighteen. *See Planned Parenthood Affiliates of Cal. v. Van de Kamp*, 181 Cal. App. 3d 245, 272 (Cal. Ct. App. 1986). Just like Kansas, the reporting statute referred to the criminal sexual abuse statute for the definition. *See id.* The California state child protective services became so overwhelmed with reports that the legislature had to amend the statute one year later, noting that they would not have amended the criminal definition of sexual abuse had they realized it would require “reporting of promiscuous activity of females under the age of 18 years . . . [which would] divert the investigative attention away from real child abuse cases.” *See id.* When the California Attorney General reinterpreted the reporting statute to mandate reporting of such sexual activity, suit was brought, and the courts invalidated his interpretation for essentially the same reasons as the Kansas courts did in *Aid for Women*. *See id.* Surprisingly enough, counsel for the plaintiffs apparently did not find this case, and none of the courts involved mentioned or cited it. The defendants did find this case, however, but cited to it only to support the proposition that minors do not have informational privacy rights in their criminal conduct under the United States Constitution, but only under the California Constitution which has much broader privacy rights. Reply Brief of Appellants, *Aid for Women v. Foulston*, No. 04-3310, 2004 WL 3172399 (10th Cir. 2004).

115. *Aid for Women*, 427 F. Supp. 2d at 1110-11. Defense experts Dr. Shadigan and Dr. Josephson both testified that minors might avoid visiting doctors for fear of reporting, and that the legal system might do more harm than good to their minor patients. *See id.* Of course, the plaintiff’s experts gave similar testimony. *See id.* at 1109-10. For those who find humor in litigation debacles, the remanded case provides a plethora of damning expert testimony. *See id.* at 1110-13. Some of this expert testimony is discussed below.

that only the state can provide, while simultaneously providing minors a confidential environment to seek out needed medical help and advice. If Kline's interpretation was followed, minors would be chilled from seeking out medical care and the advice of their mentors¹¹⁶ for fear of investigation and public disclosure of sensitive, personal information. As the Kansas district court aptly noted, such a result is not in the best interest of children.¹¹⁷

2. A New Standard for Preliminary Injunctions

The Tenth Circuit altered a substantial body of law regarding the issuance of a preliminary injunction. By assuming that all governmental action taken pursuant to a statutory scheme is in the public interest, the court not only went against precedent, it also afforded the legislature and the attorney general a protection never before seen in the Tenth Circuit.

In *Aid for Women*, the court "presum[ed] that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'"¹¹⁸ This was a drastic departure from previous cases dealing with the less rigorous fair-ground-for-litigation standard, which explicitly analyzed the statutory scheme to determine whether it was "taken in the public interest."¹¹⁹

Beyond the departure from precedent, the court's interpretation of this lowered standard fails to account for the plain language of the rule. If the court were correct in assuming that all governmental action taken pursuant to a statutory scheme is in the public interest, there would be no need to include, "in the public interest." This added qualification only reiterates what is already assumed. In fact, the determination of whether Attorney General Kline's interpretation of the statute was in the public interest was a key factor in the trial court's final decision. On remand, the court went into great detail describing why the Kline interpretation was actually *adverse* to the public interest, ultimately holding that it did more harm than good.¹²⁰

In addition, canons of statutory construction provide that "[e]very word in a statute must be given effect and meaning, and no part is to be

116. Teachers, psychiatrists, counselors, and many other non-medical professions are considered mandatory reporters. KAN. STAT. ANN. § 38-1522 (2006).

117. *Aid for Women*, 427 F. Supp. 2d at 1107.

118. 441 F.3d at 1115 n.15.

119. See, e.g., *Heideman*, 348 F.3d at 1189 (discussing the public interest involved in adoption of the statute); *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46, 52 (2d Cir. 1998) (It is clear "that the Town of Stonington, by enacting an ordinance for the purpose of 'providing for safe and efficient collection of solid waste,' was acting in the public interest."); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 n.7 (2d Cir. 1995) (discussing the public interest involved in the statute); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339 (2d Cir. 1992) (holding "the 'likelihood of success' prong need not always be followed merely because a movant seeks to enjoin government action"); *Plaza Health Labs. v. Perales*, 878 F.2d 577, 580-81 (2d Cir. 1989) (the government action was clearly in the public interest).

120. *Aid for Women*, 427 F. Supp. 2d at 1112-13.

held meaningless if it can be reconciled with the rest of the statute.”¹²¹ Of course, we are not dealing with a statute here. Nonetheless, the rules of statutory construction can provide a meaningful analogy. By assuming public interest in all governmental action, the court rendered “public interest” meaningless, even though it very well could be reconciled with the whole. Thus, the court’s assumption violates the plain meaning of the rule.

Perhaps most importantly, the court’s assumption failed to address the true issue at bar.¹²² The issue was whether Attorney General Kline’s *interpretation* of the statute violated the United States Constitution.¹²³ There was no concern that the statute itself was unconstitutional. Thus, there was no true “statutory scheme” at issue.¹²⁴ In this way, the court may have inadvertently given the judicial power of interpreting laws to the executive branch via the attorney general’s office. That is, since Attorney General Kline’s opinion was treated as a statutory scheme in this case, future attorney generals may cite *Aid for Women* when defending the constitutionality of their opinions. With such precedent in their arsenal, future attorney generals will be assured that preliminary injunctions will only be issued where there is a substantial likelihood of success on the merits. Adding this protection to their ability to interpret laws effectively usurps the judicial branch of its sole power, interpretation of the law.

In *Aid for Women*, this error proved harmless because the plaintiffs received the relief they sought. However, this precedent may prove to have negative consequences in the future.¹²⁵ The court shielded the legislature from judicial oversight by assuming that everything it does pursuant to a statutory scheme is in the public interest. As such, any plaintiff seeking a preliminary injunction against the enforcement of a statute must meet the substantial likelihood of success standard, regardless of how repugnant the statute is, or how heavily the balance of hardship tips

121. *Plesha v. Edmonds*, 717 N.E.2d 981, 986 (Ind. Ct. App. 1999).

122. The Court may not be at fault here, as the plaintiffs apparently argued that the lessened standard should be applied as, “the action of requiring automatic reporting is not in the ‘public interest.’” *Aid for Women*, 441 F.3d at 1115 n.15. Thus, the plaintiffs failed to frame the issue properly, and the court was bound to address their arguments and not create their own.

123. *Id.* at 1108.

The complaint sought ‘declaratory and injunctive relief . . . against application of the reporting statute to incidents of consensual sexual activity between . . . a minor under 16 and a person of similar age [where Plaintiffs] conclude . . . that the sexual activity has not caused the minor injury.

Id.

124. Attorney General Kline’s interpretation of the statute is not to be considered a statutory scheme: “The Attorney General cannot amend the statute by an advisory opinion . . . in accordance with the general principles of the separation of powers, the executive department cannot generally usurp or exercise judicial or legislative power.” See *Aid for Women*, 427 F. Supp. 2d at 1104 (citing *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1181-82 (Kan. 1992)).

125. This assumption has already been applied in *Graham v. Henry*, No. 06-CV-381-TCK(FHM), 2006 U.S. Dist. LEXIS 65880, at *12 (D. Okla. Sept. 14, 2006).

in the plaintiffs' favor. This is a dangerous precedent. Affording the legislature such an added protection allows it to take action adverse to the public interest without the checks and balances integral to our system of governance, with full knowledge that the courts are substantially limited in their ability to review.

IV. THE UNDERLYING MOTIVATIONS—COMING TO AN UNDERSTANDING OF *AID FOR WOMEN* AND THE KLINE OPINION

A. *Academia's Interpretation*

The limited literature there is analyzing *Aid for Women* links the case and the Kline opinion to the ongoing abortion debate in Kansas and across America.¹²⁶ While this connection is not immediately apparent, a review of the political history of Kansas, Phill Kline, and some other key players brings this connection into full view.

B. *Recent Political Developments in Kansas*

Although Kansas is traditionally a highly conservative state, both morally and politically,¹²⁷ "the state has largely withstood pressures to curtail women's abortion rights."¹²⁸ Prior to 1991, Kansas had been a paradigm of traditional Republicanism, concentrating mainly on low taxes and keeping the government out of people's lives.¹²⁹ Kansas Republicanism was of a "moderate" or "progressive" sort; Dwight Eisenhower, William Allen White and Alf Landon all came from Kansas, and are decidedly "moderate" Republicans when viewed against today's Republican Party.¹³⁰ More importantly, Kansas has historically been "ahead of the crowd on women's rights."¹³¹ Kansas was one of the early states to accept women's suffrage and reform its abortion laws prior to *Roe v. Wade* in 1973.¹³² Wichita was once known as the only place in the plains region where a woman could get a late-term abortion, mostly from the famous, or infamous, Dr. George Tiller.¹³³

126. Recent Cases, *District Court Grants Preliminary Injunction Against Enforcement of State Law Requiring Reporting of All Sexual Activity by Minors*. – *Aid for Women v. Foulston*, 327 F. Supp. 2d 1273 (D. Kan. 2004), 118 HARV. L. REV. 778, 782 (2004) [hereinafter Recent Cases]. See generally Bailey, *supra* note 110.

127. See THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA 34-35 (2004) ("Kansas today is a burned-over district of conservatism where the backlash propaganda has woven itself into the fabric of everyday life.").

128. Recent Cases, *supra* note 126, at 782.

129. Andrew Corsello, *This Man Will Do Anything to Stop Abortion*, GQ, Nov. 2005, 254, at 258. Not a single Democrat has been sent to the U.S. Senate from Kansas since 1932. FRANK, *supra* note 127, at 89.

130. See FRANK, *supra* note 127, at 89.

131. *Id.* at 89-90.

132. *Id.* at 90; see also Corsello, *supra* note 129, at 258.

133. See FRANK, *supra* note 127, at 90.

In the eighties, Kansas' state legislature was dominated by moderate Republicans.¹³⁴ In 1990, however, the voters elected a Democratic majority to the Kansas House for the second time since World War II.¹³⁵ This might have prompted what proved to be the end of moderate Republicanism in Kansas.

1. "The Summer of Mercy"

In 1991, a popular uprising led by Operation Rescue, a pro-life group known for its aggressive anti-abortion tactics, changed the political climate of Kansas forever.¹³⁶ Operation Rescue aimed to take advantage of the cultural contradiction evident in Wichita—George Tiller's abortion clinic placed directly in the center of "a population that is world-famous for its spiritual enthusiasm"—by committing acts of civil disobedience and widespread protests all over Wichita.¹³⁷ This was not the first protest Operation Rescue had organized. In 1988 they protested in Atlanta, and then again in Los Angeles in 1990.¹³⁸ This time, however, something was different.

At the suggestion of the Wichita Police Department, George Tiller and other abortion doctors in the area decided to close down for a week and wait the protests out.¹³⁹ This proved to be a disastrous move. All over the country pro-life groups saw the shutdown of the abortion clinics as a "miracle, a sign from God, and a blessing" on Operation Rescue's campaign and flocked to Kansas to participate.¹⁴⁰ What was intended to be a one-week campaign lasted for a month and a half.¹⁴¹ At the climax of the protests, over twenty-five thousand people showed up to a rally at the Wichita State University football stadium.¹⁴²

134. *Id.* at 91.

135. *Id.*

136. *Id.* at 92. Operation Rescue has been credited with incorporating "confrontational social protests [into the] pro-life movement," and turning "what had been a small, ragtag group of easily ignored protesters into a genuine movement, an aggressive national campaign that put the anti-abortion cause back onto America's Page One" which "eventually became one of the biggest social protest movements since the antiwar and civil rights campaigns of the 1960s." MARK ALLAN STEINER, *THE RHETORIC OF OPERATION RESCUE: PROJECTING THE CHRISTIAN PRO-LIFE MESSAGE* 5 (2006) (quoting CHRISTOPHER LEVAN, *LIVING IN THE MAYBE: A STEWARD CONFRONTS THE SPIRIT OF FUNDAMENTALISM* 25-26 (1998)). Operation Rescue essentially began the practice of "rescue missions" where "a hundred . . . or more people go to an abortion clinic and either walk inside to the waiting room, offering an alternative to the mothers, or sit around the door of the abortion clinic before it opens to prevent the slaughter of innocent lives." *Id.* at 7 (quoting Randall Terry, founder of Operation Rescue, found in OS GUINNESS, *THE AMERICAN HOUR: A TIME OF RECKONING AND THE ONCE AND FUTURE ROLE OF FAITH* 171 (1993)).

137. See FRANK, *supra* note 127, at 92.

138. *Id.* The Kansas protest "was the group's largest and arguably most pivotal" protest of its kind. STEINER, *supra* note 136, at 9.

139. FRANK, *supra* note 127, at 92.

140. JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR* 324 (1998).

141. See *id.* at 324, 333.

142. FRANK, *supra* note 127, at 92.

The traditional moderate Republicans of Kansas were horrified.¹⁴³ The Kansas legislature acted quickly, preparing legislation to prevent these protests in the future, mandating stiff penalties for blocking clinics and ensuring that abortions would be legal in Kansas even if *Roe v. Wade* was overturned.¹⁴⁴ The legislation cleared the Kansas House of Representatives, but the Kansas Senate blocked it before it became law.¹⁴⁵

In the 1992 elections, 83% of the committee members elected in the Republican primary were pro-life.¹⁴⁶ In Sedgwick County, "some 19 percent of the new precinct committee people responsible for throwing out the old guard actually had arrest records from the Summer of Mercy."¹⁴⁷ The pro-life movement of Operation Rescue during the Summer of Mercy effectively allowed conservative Kansas Republicans to conquer the legislature.¹⁴⁸

Among those placed in the Kansas House of Representatives was Phill Kline.¹⁴⁹ During his eight years in the House of Representatives, he drafted and helped pass a total of five bills limiting abortion rights, including the law forbidding abortions after the twenty-second week of pregnancy.¹⁵⁰ Later, in his position as Attorney General for the state of Kansas, he subpoenaed the medical records of George Tiller's abortion office in Wichita for evidence of abortions performed in violation of this law.¹⁵¹

Even with the strongly anti-abortion legislature and the numerous bills passed limiting a woman's ability to have an abortion, pro-life activists were still unhappy.¹⁵² This brings us to the 2002 Kansas Attorney General race that put Phill Kline in the Attorney General's office.

2. The Attorney General Race and the Kline Opinion

Anti-abortion activists in the state grew frustrated with the rising abortion rate in Kansas¹⁵³ and the inability to succeed in either the courts or legislature.¹⁵⁴ Thus, rather than use the legislative process to achieve

143. *Id.* at 92-93.

144. *Id.* at 94.

145. *Id.*

146. RISEN & THOMAS, *supra* note 140, at 334.

147. FRANK, *supra* note 127, at 95-96.

148. *Id.* at 96.

149. Corsello, *supra* note 129, at 258.

150. *Id.*

151. *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 369 (Kan. 2006); Corsello, *supra* note 129, at 258. This case is discussed in more detail below.

152. See Recent Cases, *supra* note 126, at 782.

153. The abortion rate in Kansas grew 15% between 1996 and 2000. See TRENDS IN ABORTION IN KANSAS, 1973-2000, 2003 ALAN GUTTMACHER INST. 2, available at http://www.agi-usa.org/pubs/state_ab_pt/kansas.pdf [hereinafter GUTTMACHER INST.]; see also Recent Cases, *supra* note 126, at 782 n.38.

154. Recent Cases, *supra* note 126, at 782. Of course, they had some success in the legislature, as previously discussed. However, the rise of abortion in recent years is evidence of the apparent failure of the new laws in place. See GUTTMACHER INST., *supra* note 153.

their goals, pro-life supporters sought an attorney general they could trust to place pressure on abortion doctors through the re-interpretation of pre-existing laws.¹⁵⁵ As it played out, the 2002 race for Attorney General focused primarily on abortion, with both candidates arguing that he alone could provide better enforcement of the existing laws regulating abortion.¹⁵⁶ With the support of abortion activist groups,¹⁵⁷ Phill Kline won the Attorney General position and immediately began his moral crusade against abortion.¹⁵⁸

3. *Alpha Medical Clinic v. Anderson*¹⁵⁹

In the same year that Attorney General Kline issued the Kline opinion, he “subpoenaed the entire, unredacted files of 90 women and girls who obtained abortions” at two Kansas abortion clinics in order to investigate “potential violations of two specific statutes . . . *K.S.A. 65-6703*, which deals with abortions performed at or after 22 weeks gestational age, and *K.S.A. 2004 Supp. 38-1522*, which governs mandatory reporting of suspected child abuse.”¹⁶⁰ The petitioners filed a motion to quash the subpoenas, but the state trial court judge, Judge Richard Anderson, denied the motion and ordered the petitioners to produce the 90 unredacted patient files.¹⁶¹

The petitioners filed a petition for mandamus with the Kansas Supreme Court only two days before the files were to be released. The Kansas Supreme Court held that the subpoenas were unenforceable as issued.¹⁶² The court ordered Judge Anderson to permit the inquisition “only if [he] is satisfied that the attorney general is on firm legal

155. See Recent Cases, *supra* note 126, at 782-83.

156. *Id.* Tim Potter, *Abortion Dominates Attorney General Race*, WICHITA EAGLE, Oct. 5, 2002, at 1; see also Jim Sullinger & Steve Kraske, *Kline Names Abortion Protest Figure to Staff*, KAN. CITY STAR, Jan. 28, 2003, at B1.

157. Potter, *supra* note 156, at 1.

158. Attorney General Kline quickly appointed Bryan J. Broan to the consumer protection division. Mr. Broan was arrested seven times during the Wichita Summer of Mercy Protests. See Sullinger & Kraske *supra* note 156, at B1.

159. 128 P.3d 364 (Kan. 2006).

160. See *Alpha Med. Clinic*, 128 P.3d at 369-70; 2003 Kan. AG LEXIS 22 (2003). During his tenure in this legislature, Attorney General Kline also co-sponsored a law that prevents the release of any identifying information relating to victims of sex-crimes. See Bailey, *supra* note 110, at 1029; KAN. STAT. ANN. § 45-221 (a)(10)(F) (2006). While Attorney General Kline claims that he specifically requested all patient-identifying information to be redacted from the files in order to comply with this law, the Kansas Supreme Court noted that he changed his position midway through the proceedings in *Alpha Medical Clinic*. Compare *Alpha Med. Clinic*, 128 P.3d at 378, with Press Release, Office of Kansas Attorney General Phill Kline, Statement by Attorney General Kline Concerning Latest Action in Judicial Inquiry of Child Rape and Illegal Late-Term Abortion (Mar. 16, 2005), available at http://www.accesskansas.org/ksag/Press/2005/0316_statement_abortion.htm; Bailey, *supra* note 110, at 1029.

161. *Alpha Med. Clinic*, 128 P.3d at 370.

162. *Id.* at 924.

ground.”¹⁶³ The court further required the redaction of all patient identifying information from the files.¹⁶⁴

Attorney General Kline claims that the subpoenas were issued to “investigat[e] into alleged cases of child rape, failure to report child rape and violations of the state’s late-term abortion statute.”¹⁶⁵ This cause is valid and noble, and it is the province of the Attorney General to investigate violations of the law. However, it is not clear that the subpoenas were truly aimed at “smoking out” child rapists and those who fail to report. For if “they had been, Kline would be going after the medical records of girls who had their babies as zealously as he went after those who aborted.”¹⁶⁶ Of course, the subpoenas might provide valuable information leading to the arrest of child rapists, but his selective application of the laws on abortion clinics alone is, at the very least, suspect.¹⁶⁷

C. Coming to an Understanding of the Kline Opinion

One cannot blame a publicly elected official for appeasing his constituents through lawful means, and Attorney General Kline is no exception.¹⁶⁸ The political climate of Kansas, the attorney general race and his deeply held religious beliefs¹⁶⁹ all play a part in both why he got elected and why he interpreted the reporting statute the way he did. Ultimately, to understand *Aid for Women v. Foulston* is to understand the Kline opin-

163. *Id.*

164. *Id.* at 924-25.

165. Press Release, Office of Kansas Attorney General Phill Kline, Attorney General Phill Kline Takes Possession of Medical Records (Nov. 1, 2006), available at http://www.ksag.org/Press/2006/1101_medicalrecords.htm.

166. Corsello, *supra* note 129, at 261.

167. The *Alpha Medical Clinic* decision also involved contempt proceedings brought against Attorney General Kline for attaching redacted portions of the District Court hearing transcript and later discussing the brief and its attachments at a press conference. *Alpha Med. Clinic*, 128 P.3d at 380. This was in direct violation of District Court Judge’s order requiring all filing to be made under seal and further restricting disclosure of the transcript. *Id.* The Supreme Court of Kansas found Attorney General Kline’s initial responses “troubling.” *Id.* at 928. He admitted to knowingly violating Judge Anderson’s order in attaching the sealed court records to the brief because “he believed it to be necessary to further his arguments,” and held a press conference “merely because he determined that petitioners had painted his previous actions in an unflattering light.” *Id.* He then permitted his staff to provide copies of the sealed transcript “to anyone who requested them.” *Id.* The court stated, “[i]n essence, Kline has told this court that he did what he did simply because he believed he knew best how he should behave, regardless of what this court had ordered, and that his priorities should trump whatever priorities this court had set.” *Id.* at 928. Lucky for Attorney General Kline, his lawyer, former Attorney General Stephan (the author of the initial attorney general opinion interpreting the reporting statute) “wisely altered the tone of Kline’s response.” *Id.* at 929. “He characterized whatever mistakes Kline may have made as honest ones and said that his client was acting in good faith . . . [and] made a classic ‘no harm, no foul’ argument:” any harm that arose from the disclosure of sealed material did not effect the soundness of the outcome of the case. *Id.* Ultimately, the court concluded that “despite the attorney general’s initial defiant tone, he should not be held in contempt” as no prejudice resulted from his conduct. *Id.*

168. Attorney General Kline was not reelected in the 2006 midterm elections. See Press Release, Office of Kansas Attorney General Phill Kline, Statement by Attorney General Phill Kline (Nov. 7, 2006), available at http://www.accesskansas.org/ksag/Press/2006/1107_Statement.htm.

169. Corsello, *supra* note 129, at 258-59 (noting that Kline keeps a bible on his desk, reads scripture before work everyday, and wears his religion on his sleeve).

ion, and to understand the Kline opinion is to understand where it came from. Hopefully some light has been shed on this decidedly strange case.

D. The Cost of the Lawsuit

Complete figures are not available for the cost of this lawsuit. However, experts in the first trial court decision alone cost \$230,609.98.¹⁷⁰ The highest paid expert was Dr. Vincent M. Rue, who received \$152,701.25 but never testified.¹⁷¹ In the remanded case, the court noted that he did not testify and his participation in the matter was largely a mystery, although some other experts indicated that he was involved in organizing the team of experts.¹⁷²

As for the other experts, who received over \$77,000 for their testimony, none provided any support for Attorney General Kline's position.¹⁷³ Dr. Josephson was paid \$15,225 to testify that mandatory reporting might deter some minors from seeking medical help, that he himself does not report all consensual sexual activity between age-mates under sixteen, and that if the plaintiffs' expert Dr. Kellogg were doing every examination, he might feel more comfortable with discretionary reporting.¹⁷⁴ Of course, the court found his testimony "inconsistent and therefore unreliable. In fact, his own practice and opinion as to what should be reported is not as broad as the reporting requirements of the Kline Opinion."¹⁷⁵

Dr. Shadigan was paid \$18,900 dollars for equally damning testimony.¹⁷⁶ She testified that mandatory reporting might do more harm to the minor than the sexual activity itself and that she does not report all such illegal activity herself.¹⁷⁷ Several other experts were paid for their services, but did not make it into the trial court's decision.¹⁷⁸ Ultimately, the experts for the defense were "unreliable" at best, but damning to the case at worst.

Of course, these figures do not reflect the cost for the appeal, the Attorney General Office's time and resources, the court's time, and the cost to the defense.

170. Litigation Fees Paid – December 9, 2004 through December 31, 2005, <http://www.ksag.org/Press/2006/12-31-05contractpayments.htm> [hereinafter Litigation Fees Paid].

171. *Id.* Dr. Rue is an anti-abortion researcher who co-directs the Florida Group Institute for Pregnancy Loss. Bob Ellis, *South Dakota Abortion Task Force Hears Testimony*, DAKOTA VOICE, Apr. 6, 2006, http://www.dakotavoices.com/200511/20051122_3.html (last visited Jan. 19, 2007).

172. *Aid for Women v. Foulston*, 427 F. Supp. 2d 1093, 1110 n.14.

173. Litigation Fees Paid, *supra* note 170; *Aid for Women*, 427 F. Supp. 2d at 1110-13.

174. *Aid for Women*, 427 F. Supp. 2d at 1110-11.

175. *Id.*

176. Litigation Fees Paid, *supra* note 170; *Aid for Women*, 427 F. Supp. 2d at 1110-12.

177. *Aid for Women*, 427 F. Supp. 3d at 1110-12.

178. Dr. Shunn – \$1,075; Dr. Yarbrough – \$1,895; Dr. Swanson – \$9,733.63; Dr. Meeker – \$7,605. Litigation Fees Paid, *supra* note 170.

E. All for Nothing

Attorney General Kline took the outcome of this case as a victory:

In bringing this lawsuit . . . plaintiffs contended that the reporting statute is unconstitutional. The judge found that the statute was clear and did not violate equal protection, vagueness, or decisional privacy rights. The constitutionality of the statute has been upheld.

We have defended the constitutionality of the law successfully. The judge made his ruling in light of the earlier finding by the Tenth Circuit Court of Appeals that the state has a substantial interest in protecting its children.¹⁷⁹

While this statement is not a lie, *per se* (except for the claim that the plaintiffs' challenged, "that the statute is unconstitutional"¹⁸⁰) it borders on absurdity. The court did not speak to equal protection and did not speak to the constitutionality of the statute.¹⁸¹ There was no claim of a violation of equal protection rights at all. As a matter of fact, a recent Harvard Law Review article criticized the plaintiffs for failing to assert the equal protection claim.¹⁸²

Attorney General Kline's delusions aside, he did not win this case. That much is clear. His interpretation of the statute was held unconstitutional, and he was enjoined from enforcing it as interpreted. But, he did not appeal the case to the Tenth Circuit. Perhaps he did not leave any issues to be appealed, perhaps he realized the futility of the fight, perhaps he was convinced by the court's decision. No one knows.

All this leads to important questions: Why did Phill Kline appeal the preliminary injunction? What goals did he have in mind? He knew that regardless of the outcome, the case would return to the same District Court Judge in Kansas who would undoubtedly come to the same conclusions. He risked the possibility of precedent seriously adverse to his

179. Press Release, Office of Kansas Attorney General Phill Kline, Statement of Attorney General Kline Concerning Federal District Court Ruling in Underage Reporting Case (Apr. 18, 2006), available at http://www.accesskansas.org/ksag/Press/2006/0418_underage_reporting.htm. Of course, the court did make their determination in light of the states substantial interest in protecting its children – enforcing the Kline Opinion would be *adverse* to their best interests, and thus the permanent injunction was granted. *Aid for Women*, 427 F. Supp. 2d at 1107 (stating "[h]ow is the best interest of the child served by not seeking health care in either circumstance? Clearly, it is not.").

180. Statement of Attorney General Kline Concerning Federal District Court Ruling in Underage Reporting Case (Apr. 18, 2006), http://www.accesskansas.org/ksag/Press/2006/0418_underage_reporting.htm; *Aid for Women*, 427 F. Supp. 2d at 1095 (asserting that "[p]laintiffs seek to prevent enforcement of Kansas Attorney General Phill Kline's application of the state mandatory reporting statute, through an Attorney General's opinion, to consensual underage sexual activity."). Attorney General Kline missed the issues – perhaps that speaks to his ultimate defeat.

181. *Aid for Women*, 427 F. Supp. 2d *passim*.

182. Recent Cases, *supra* note 126, at 783 n.44 ("[A]n argument could be made that enforcing Attorney General Kline's opinion would violate the equal protection rights of young women" as only the female's name would be turned over to state agencies.).

point of view (a minor's right to informational privacy being one) and stood to win very little. At the very least, one would expect him to appeal the case to the Tenth Circuit again, but he simply did not.

Perhaps he honestly believed that he won the case. The only press release he issued after the District Court's final decision is quoted above, and indicates he felt victorious.

Of course, to attribute such a ridiculous point of view to a man as intelligent as Phill Kline would be unfair. In all likelihood, he probably felt the chances of victory were slim, the cost would be high, and any possible outcome would not be worth the expense. In light of the trial court record, replete with expert testimony tending to show his interpretation was actually injurious to the health of minors, he might have been correct in assuming he would not win. Regardless of the Tenth Circuit's apparent sympathy for his interpretation, the facts and record that would be relied upon could hardly have supported a reversal. The damning expert testimony, the existence of a minor's right to privacy, and the strength of the plaintiffs' arguments would prove a significant hurdle to victory. Ultimately, all we know is that he did not appeal the decision, and his interpretation will never have the force of law.

CONCLUSION

No one can deny that Phill Kline thinks he is working his hardest to protect the children of Kansas. That being so, he doesn't always choose the best methods of protection. Forcing disclosure of teenage sex will only serve to dissuade impressionable, fearful youth from seeking medical help and advice from their elders. Everyone wants to curb teenage sex and the unwanted pregnancies that come with it, but in so doing human nature must be taken into account before policies are implemented that may look noble on their face, but only lead to disastrous results in the end.

Underneath the lawsuits, critiques, anger and rhetoric revolving around this case is a problem that sits deep in the American public—the abortion debate. Somewhere during the debate, people lost their sense, lost their reason, and began relying on absolutes. One is either pro-choice or pro-life, and it seems that whatever stance is taken, the arguments grow more and more absolutist in nature as time goes on.¹⁸³

This case is a paradigm example of what happens when an attorney general grabs hold of this absolutist mentality and runs for the finish line. Teenage sex leads to pregnancy, pregnancy leads to abortion, abortion is bad, and therefore all teenage sex is bad. We know this can't be true. The last thing in one's mind when Romeo and Juliet made love for the first time was the awful, inherently injurious nature of consensual teen

183. See Corsello, *supra* note 129, at 259.

sex. Many parents met, made love, and had children, all before they were 18. And some of them are still together, and happy. The legislature appreciated this fact, and took steps to acknowledge it. Thus, where teenage sex causes injury to one of the parties, it should be reported for further investigation—to protect the children *when they need protection*. By getting sucked into the rhetoric of absolutes, the children who need the most protection are actually being harmed. Fortunately, the courts are here to curb this line of thinking and come to reasoned decisions effectuating the noblest of intentions.

*Todd Scardina**

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